Supreme Court, U.S.
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Case No.

IN THE

Supreme Court Of the United States

CATHY D. BROOKS-McCOLLUM,

Petitioner(s)

v.

Kenneth Shareef, Renford Brevett, Maudy Melville,
Valerie Longhurst, Ruth Vivardis, Mark Martell,
Edward Kafader, Ferry, Joseph & Pearce

Respondent(s)

On Petition For Writ of Certiorari
To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Constitution provide parties to carry out crimes as result of the States violation of Federal Law and the Constitution and after its' ruling, made in an effort to help and aide a friend?

2. Does the Constitution allow a State Court and/or the State to rule against Federal law and then admit that it erred, and then claim the error affords immunity? Then would the State and parties who benefited and acted on error all become State Actors for having violated another's' constitutional right thus disallowing the other party their Fourteenth Amendment Right?

3. Do the Constitution and Federal law and what the US Supreme Court intended allow all proceedings associated with a case to be Stayed until at such time Indemnification is ruled upon and a decision has been made in all courts regarding the States violations on issues before it?

4. Should there have been a ruling regarding the validity of a Settlement agreement made while issues were in the Federal courts between Petitioners and Respondents, as submitted before the US Court Of Appeals For The Third Circuit, where no official hearing was had in the US Court Of Appeals, when Respondents signed and agreed to in writing, and Petitioner filed a Motion For Specific Performance in both the US District Court For The State of Delaware and the US Court of Appeals For The Third Circuit?

5. Should the US Court maintain jurisdiction, since it is clear that the State erred (or intentionally ignored the laws) and in doing so violated Petitioners rights, and along with Respondents caused Petitioner to lose property?

6. Does the US Courts have jurisdiction to Order the State To adhere to the law pursuant Federal Law and the Constitution, and allow Petitioner to be indemnified in order to proceed with trial, and is Indemnification prior to trial what this court intended to protect a party, as well as one to have counsel to continue a Derivative action on behalf of a Corporation, where coverage is available?

LIST OF ALL PARTIES TO PROCEEDING IN THE THIRD CIRCUIT COURT OF APPEALS

1. Kenneth Shareef
2. Renford Brevett
3. Maudy Melville,
4. Valerie Longhurst
5. Ruth Vivardis
6. Mark Martell,
7. Edward Kafader
8. Ferry, Joseph & Pearce

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OPINIONS BELOW

On 3/01/06 The Court Of Appeals Issued an Order denying Appellee's Bill Of Cost. The Court Of Appeals submitted its opinion on 12/8/05 and filed its' Opinion on 2/10/06. On 8/05/05 The Court Of Appeals issued an Order Denying Appellant's Motion To Amend Caption. On 2/7/05 The Court f Appeals issued an ORDER denying Appellant's motion for reconsideration of the Clerk's Order dated 1/31/05. On 1/31/05 The Court Of Appeals issued an ORDER denying Appellant's motion for appointment of counsel. On 11/04/2005 the District Court For Delaware issued an Order denying Appellants' Motion for Reargument. On 8/25/2005 the District Court For Delaware Issued and Order denying Appellant's Motion To Correct & Reconsideration For Stay. On 1/11/2005 the District Court For Delaware issued an Order Dismissing Appellant's Complaint in its' entirety. On 9/14/2004 the District Court For Delaware issued Order staying pleadings after the time expired for Appellees' to issue a response, allowing Appellee's to file a Motion To Dismiss and set Briefing Schedules. ON 8/31/2004 the District Court For Delaware issued an Order denying Plaintiff's Motion to postpone the Rule 16 Scheduling Conference. On 7/16/2004 the District Court for the District Of Delaware issued an Order setting a Rule 16 Scheduling Conference.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The equal protection clause of the Fourteenth amendment to the United States Constitution provides in pertinent part:

> No state shall....deny to any person within its jurisdiction the equal protection of the laws.

The equal protection clause of the Ninth amendment to the United States Constitution provides in pertinent part:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

> The equal protection clause of the Seventh amendment to the United States Constitution provides in pertinent part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

A. **State Courts Violation of Respondents Constitutional Rights, which went against Federal Law and the Constitution.** The Supreme Court discussed the standards for determining which federal statutes are enforceable under § 1983 in *Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987), Wilder v. Virginia Hospital Association, 496 U.S. 498 (1990), Suter v. Artist M., 503 U.S. 347, 355-356 (1992), and Blessing v. Freestone, 520 U.S. 329, 117 S. Ct. 1353 (1997). See Messier v. Southbury Training School, 916 F. Supp. 133, 142-146 (D.Conn. 1999).*

B. The resulting Wright/Wilder/Blessing test, set out in Blessing, supra, 520 U.S. at 340-341, states:

(1) There is a rebuttal presumption that a statute is enforceable under §1983 if the Petitioners can show that:

(a) Congress intended the provision to benefit the Petitioners;

(b) The right is not too vague and amorphous to enforce;

(c) The provision unambiguously imposes a binding obligation on the states.

(2) The statute is enforceable unless the Respondent can prove that Congress has foreclosed a §1983 remedy. (This has not been proven by Respondents)

Congress may clarify that a particular statute is not actionable under §1983, either by express words, or by providing a comprehensive alternative enforcement scheme. *Livadas v. Bradshaw, 512 U.S. 107 (1994).*

B. Respondents became State Actors, when the State allowed them to benefit from their ruling, which went against the Constitution and Respondents carried out crimes, as a result of the violation. When a judge acts as a trespasser of the law, when a judge does not follow the law, the judge loses subject-matter jurisdiction and the judge's orders are void, of no legal force or effect.

The U.S. Supreme Court, in *Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 1687 (1974)* stated that "when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

The judge then acts not as a judge, but as a private individual (in his person).

The U.S. Supreme Court has stated that "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." *Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401 (1958).*

Any judge who does not comply with his oath to the Constitution of the United States wars against that Constitution and engages in acts in violation of the Supreme Law of the Land. The judge is engaged in acts of treason.

If a judge does not fully comply with the Constitution, then his orders are void, *In re Sawyer, 124 U.S. 200 (1888)*, he/she is without jurisdiction, and he/she has engaged in an act or acts of treason.

Whenever a judge acts where he/she does not have jurisdiction to act, the judge is engaged in an act or acts of treason. *U.S. v. Will, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980); Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 404, 5 L.Ed 257 (1821)*

In 1994, the U.S. Supreme Court held that "Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." *Liteky v. U.S., 114 S.Ct. 1147, 1162 (1994).*

Courts have repeatedly held that positive proof of the partiality of a judge is not a requirement, only the appearance of partiality. *Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194 (1988)* (what matters is not the reality of bias or prejudice but its appearance); *United States v. Balistrieri, 779 F.2d 1191 (7th Cir. 1985)* (Section 455(a) "is directed against the appearance of partiality, whether or not the judge is actually biased.") ("Section 455(a) of the Judicial Code, 28 U.S.C. §455(a), is not intended to protect litigants from actual bias in their judge but rather to promote public confidence in the impartiality of the judicial process.").

That Court also stated that Section 455(a) "requires a judge to recuse himself in any proceeding in which her impartiality might reasonably be questioned." *Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989). In Pfizer Inc. v. Lord, 456 F.2d 532 (8th Cir. 1972)*, the Court stated that "It is important that the litigant not only actually receive justice, but that he believes that he has received justice."

Our Supreme Court has ruled and has reaffirmed the principle that "justice must satisfy the appearance of justice", *Levine v. United States, 362 U.S. 610, 80 S.Ct. 1038 (1960), citing Offutt v. United States, 348 U.S.*

11, 14, 75 S.Ct. 11, 13 (1954). A judge receiving a bribe from an interested party over which he is presiding, does not give the appearance of justice.

"Recusal under Section 455 is self-executing; a party need not file affidavits in support of recusal and the judge is obligated to recuse herself/himself sua sponte under the stated circumstances." *Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989)*.

Further, the judge has a legal duty to disqualify himself even if there is no motion asking for his disqualification. The Seventh Circuit Court of Appeals further stated that *"We think that this language [455(a)] imposes a duty on the judge to act sua sponte, even if no motion or affidavit is filed."* Balistrieri, at 1202.

Should a judge not disqualify himself as required by law, then the judge has given another example of his "appearance of partiality" which further disqualifies the judge. Should another judge not accept the disqualification of the judge, then the second judge has evidenced an "appearance of partiality" and has disqualified himself/herself. None of the orders issued any judge who has been disqualified by law are valid, they are void as a matter of law, and are of no legal force or effect.

Should a judge not disqualify himself, then the judge is violation of the Due Process Clause of the U.S. Constitution. *United States v. Sciuto, 521 F.2d 842, 845 (7th Cir. 1996)* ("The right to a tribunal free from bias or prejudice is based, not on section 144, but on the Due Process Clause.").

Should a judge issue any order after he has been disqualified by law, and if the party has been denied of any of his/her property, then the judge may have been engaged in the Federal Crime of "interference with interstate commerce". The judge has acted in the judge's personal capacity and not in the judge's judicial capacity.

Courts have repeatedly ruled that judges have no immunity for their criminal acts. Since both treason and the interference with interstate commerce are criminal acts, no judge has immunity to engage in such acts.

C. Violation of Petitioner's Constitutional Rights and Federal Law. Although an individual shareholder may bring a derivative suit to redress injuries to a corporation, the claims asserted in the suit belong to the corporation, not the individual shareholder, whose rights are merely derivative and may be asserted only through the corporation. Chancery Courts opinion **[Appendix 44a]** clearly goes against this, committing further violations against Petitioners. *See Third Nat'l Bank v. Celebrate Yourself Productions, Inc., 807 S.W.2d 704, 707-08 (Tenn. Ct. App. 1990) (citing Commercial Credit Development Co. v. Scottish Inns, Inc., 69 F.R.D. 110, 117 (E.D. Tenn. 1975))*. Consequently, a derivative suit cannot be maintained by a shareholder in Petitioners own name but must

be brought in the name of the corporation. However, the State Court disallowed this, by stating, "that it would not rule upon Indemnification, until proceedings are over, thus allowing access to counsel".

US Court of Appeals for the 3rd Circuit, commenting on the importance of derivative suits, stated:

Historically, the derivative suit has been the principal defense of the minority shareholder against abuses by the majority. Such suits protect the stockholders of a corporation against management, which is sometimes unrepresentative and on occasion insufficiently concerned with the minority's interests. Often where the wrongdoing is on the part of corporate officers and director's management has refused to act and where the wrongdoers control the corporation there is but small chance that the corporation itself will bring suit or vigorously prosecute the litigation. Equity, therefore, provided shareholders with the device of a derivative suit by means of which they could assert the interests of their corporation against management and third parties when those in control of the corporation were acting in breach of trust. *McClure v. Borne Chemical Co., 292 F.2d 824, 827 (3d Cir.), cert. denied, 368 U.S. 939 (1961).* However, Delaware State penalized Petitioners for invoking said right and stated, *"that the right was not that of the Corporation or Petitioner"* in **[Appendix 44a]** [Pg 27 of Transcript]. When Chancery Court 147-N ruled that Kafader of Ferry, Joseph and Pearce could represent Respondents in its' Court, State Farm and the Corporation, knowing that the case was a Derivative Action that Court violated the Corporations Constitutional and Civil Rights and violated the Ninth Amendment Right by trying to disparage the Corporation from bringing suit. (Again showing this to be a §1983 action) This Court knew at this time that this was a conflict of interest and ignored all the evidence and laws before it. State Farm was being sued on behalf of the Corporation, Respondents were being sued on behalf of the Corporation, Respondent Kafader, Ferry, Joseph and Pearce were being sued on behalf of the Corporation. Respondents believed that they would succeed in coercing and threatening Petitioners in giving up their Constitutional and Civil Rights. Only after presenting the State cause of action did Chancery Court and the State admit it erred, without correction.

The State Court indicated that these six (6) people were the company, by stating, *"Right. But as a legal matter, your understanding is incorrect. You are a shareholder. You have certain rights, important rights as a shareholder of a company, one of which is to file a derivative action, which is something that you've done. But the company itself is separate from the shareholders. And when you sue somebody, that's you personally as a shareholder suing. It's not the company."* **[Appendix 44a]**-[Pg. 28 of Transcript]) This court acknowledges Petitioner's suit was derivative, and

brought as a Director of the Corporation, at the same time going against the higher courts ruling that the derivative suit belongs to the Corporation. Petitioner's indemnification was denied stating that the derivative right was Petitioners personally and not that of the company, which is inaccurate.

Chancery Court further stated in **[Appendix 42a]**-[Page 9 of Transcript], *"And it will continue to operate that way until some court – if it ever does...."* Chancery Court is clearly stating that he may never entertain the current Complaint or any Compl int filed by Petitioners, thus violating Petitioners Constitutional and Civil Rights. Even after the US Court Of Appeals stated in its' Opinion based on the evidence presented before it that it saw *"there were quintessential state law causes of action; slander, violations of provisions of Delaware criminal code, questions of corporate governance, and violations of Delaware Code Of Professional Conduct"*, the State has failed to allow indemnification, the state has failed to supply or process Petitioner's Complaint for the felony charges outlined in the US Court Of Appeals briefs, the state has failed to rule upon and begin the judicial process. Even after the US Court Of Appeals decision these Respondents are now claiming that they too are entitled to immunity for the crimes they committed, of which the State has failed to respond to said Motion.

Indemnification ruled on and denied for Petitioner, but not ruled on regarding Respondents, who were never validly elected, where Respondents further acted in State, and continued to toll costs against the Corporation, based on States Violation. The Delaware Supreme Court confirmed in Civil Action 396, 2004 as noted in its' Order **[Appendix 48a]** Footnote 2 that, *"It appears that at all times relevant, McCollum herself was a member of the board." "Petitioner herself was a Director at all times relevant"*. The State Chancery Court, and Respondents jointly, both have continually denied Petitioner access to the Corporations insurance policy. The Delaware Supreme's Court Opinion should have served as an undertaking and support of Petitioner having been the only party confirmed to be a validly elected Director.

The Chancery's court opinion decided on July 24, 2004 **[Appendix 20a-25a]** clearly states that it did not and has not allowed Petitioners Indemnification to be invoked, because the issues were too premature to decide such. However, the Chancery Court never ruled upon the validity of Indemnification of Respondents, of which none of them are legal, and confirmed by their counsel **[Appendix 32a, 28-31a]**. This goes against. In *re P.J. Keating Company, 180 B.R. 18 (Bankr. D.Mass. 1995). See, e.g., MacMillan, Inc. v. Federal Ins. Co., 741 F. Supp. 1079 (S.D.N.Y. 1990); Atlantic Permanent Federal Savings & Loan Assoc. v. American Casualty Co., 839 F.2d 212 (4th Cir. 1988); Waldoboro Bank v. American Casualty*

Co., 775 F. Supp. 432 (D. Main 1991). This is clearly a substantial violation of State and federal laws and Petitioners First, Ninth and Fourteenth Amendment Rights, Civil Rights. (§1983 applies to all) If it is premature to allow Petitioners to be indemnified, it would also be premature to have and allow Respondents to utilize the Corporations policy or Corporations funds, prior to their following the proper indemnification procedure and believe this is not a violation of ones First, Seventh, Ninth and Fourteenth Amendment. Chancery Court has made a ruling to allow Petitioners advancement of fees and indemnification would be premature **[Appendix 20a-21a]**, but has allowed Respondents to continue raising costs against the Corporations policy and the Corporation, without ruling on their validity, in that none of the persons acting as Directors are valid and all were appointed by one another as the court documents show. Petitioners are the only parties who followed proper indemnification procedure in accordance to Title 8, Chapter 1, Subchapter IV, Section 145(d) of Delaware's General Corporation laws, which state as follows for indemnification: *"a majority vote of the directors who are not parties to such action, suit or proceeding...."*. can decide if a person is a valid director to be indemnified".....(3) *"if there are no such directors, or if such directors so direct, by independent legal counsel in written opinion, or (4) by the stockholders"*. The stockholders have been lied to by all Respondents and the Corporation's Counsel, who is a friend of the Respondent's counsel.

a. Delaware Title 8, Subchapter IV, Section 141 of the General Corporation Law.

b. Delaware Title 8, Subchapter IV, (a) of the General Corporation Law.

c. Delaware Title 8, Chapter 1, Subchapter IV, Section 145(d).

d. Indemnification is available regardless of the D&O's role in the litigation, including as a Petitioners, intervener or amicus curiae. Hibbert v. Hollywood Park, Inc., 457 A.2d 339 (Del. 1983). However, in *Shearin v. E.F. Hutton Group, Inc., 1994 Del. Ch. LEXIS 69 (Del. Ch. June 7, 1994)*, an officer who initiates a lawsuit is entitled to indemnification only if the lawsuit is brought as part of the officer's duties to the corporation or its shareholders. (Petitioners is not suing the Corporation) *Accord, Augat, Inc. v. Collier, 1996 WL 110076 (D. Mass. Feb. 8, 1996)*.

e. Respondents infer that Delaware Title 8, Section 145 (a)(b)(c) infers that persons defending a lawsuit are only entitled to indemnification. First, Petitioners in any proceeding can be defending a lawsuit. Furthermore, The Corporations Bylaws **[Appendix 51a-52a]** and Certificate Of Incorporation **[Appendix 53a]** provide much broader coverage then that of the General Corporation Laws. The Certificate Of

Incorporation **[Appendix 53a]**, number 10 provides broader coverage then the Bylaws and General Corporation laws and would not require Petitioners to pay any fees.

Walt Disney Derivative Litigation, 2003 Del.Ch.LEXIS 52 (May 28, 2003) supports the reckless acts of these parties.

Carmody v. Toll Brothers Inc., Del. Ch., CA No. 15983 (July 24, 1998) "Continuing director" provisions are designed to prevent a hostile suitor from engaging in a proxy contest or consent solicitation to remove an incumbent board of directors and then have the new board amend or redeem the poison pill (Respondents Vivardis). These provisions prevent the redemption or amendment of poison pills where there are no continuing directors, and if valid, provide a powerful weapon for a company to fend off a hostile takeover. *Smith v Van Gorkum 488 A. 2d 858 (Del. Supr. 1985)* Supreme court reversed and directed that judgment be entered in favor of the Petitioners and against the Respondents directors for the fair value of the Petitioners' stockholdings in Trans Union, in accordance with *Weinberger V. UOP, Inc., Del.Supr., 459a.2d 701 (1983)*.

In Pereira v. Cogan, 2003 U.S. Dist. Lexis 7818 (S.D.N.Y. 2003), the influential District Court for the Southern District of N.Y. held that a firms directors and officers had breached their fiduciary duties by failing to monitor and prevent the self dealing transactions of the chief executive officer.

The court analyzed which officers and directors had knowledge of these transactions and could have monitored or prevented them. (quoting *In re Healthco Int'l Inc. 1997 Bankr. LEXIS 465 (Bankr.D.Mass.April 9, 1997)*. In addition the court held that the officers and directors owed a fiduciary duty of due care, loyalty and good faith to Trace. These parties are not valid directors, who are continuing a fraud as a means to deceive the Corporation.

Of nine specific transactions that were challenged, two involved board action; ratifying Cogan's compensation and declaring Trace's dividends. In both instances the court found that the Directors breached their duties of loyalty and due care as established in the seminal case of *Cede & Co. v. Technicolor Inc., 634 A.2d 345 (Del.1993)*.

The court relied on the standards est. in *In re Caremark International Inc. Derivative Litigation, 698 A.2d 959 (Del.Ch.1996)*, stating directors legal obligation "to include duty to attempt in good faith to assure that corporate information and reporting system...exists, and the failure to do so under some circumstances may...render a director liable for losses caused by non-compliance with applicable legal standards.

Respondents tried concealing their acts by voting to ratify their illegal actions (under the Direction of their counsel Edward Kafader). **[Appendix 32a]** Ratification or condonation is not a defense for past criminal behavior. *See Gilbert v. United States, 359 F.2d 285, 287 (9th Cir.1966)* **[Appendix 34a]**, -[Pg 9 of Transcript] supports Kafader giving his blessings and encouragement of these violations. These persons chose to further appoint persons to a board established illegally, in an attempt to cover up their actions. Then in **[Appendix 71a]** Agenda dated 8/11/2004 under the direction and advice of Kafader, the board went before the Corp. attempting to have them certify their illegal acts. Kafader knew this was a violation of the Rules Of Professional Conduct.

In *Stifel Financial Corporation v. Cochran*, the court determined that officers and directors were entitled to attorney fees and other expenses incurred in bringing such a suit under a bylaw that provided for mandatory indemnification "to the full extent authorized by law." In so ruling, the court noted that allowing such "fees on fees" awards would prevent a corporation from wearing down a former director or officer with a valid claim for indemnification through extensive litigation. Stifel reversed an earlier line of cases establishing that "fees on fees" are not available unless expressly provided for *See, e.g., Mayer v. Executive Telecard, Ltd., 705 A.2d 220 (Del. Ch. 1997)*.

The right to advance of expenses can be much broader than the right to indemnification. *In Citadel Holding Corporation v. Roven, 603 A.2d 911 (Del. 1992)*, the Delaware Supreme Court interpreted an indemnification agreement as requiring the corporation to advance expenses incurred by a director who was sued by his corporation for violations... The Court considered this counterclaim as an affirmative defense, which triggers the advancement obligation. *See also, Megeath v. PLM International, Inc., Case No. 930369 (Cal. Sup. Ct. San Fran., Mar. 18, 1992); Lipson v. Supercuts, Inc., Civil Action No. 15074 (Del. Ch. Ct., Dec. 10, 1996); Neal v. Neumann Medical Center, 667 A.2d 479 (Pa. 1995)*. The Corporation Bylaws are clear in stating that advancement of fees is a contract right, and all issues before Chancery Court were brought on due to Petitioner's role as a Director. Respondents have attempted to wear down Petitioners (Ninth Amendment violation) while continuing criminal activity. If it were not for Petitioners being a Director these acts would not have been committed. However, Chancery Court argues that Petitioners defending these acts of persons committed while they were utilizing corporate property are personal and has penalized Petitioners. It is clear that these Respondents were and continue to act in State.

In Heffernan v. Pacific Dunlop GNB Corp., 1992 U.S. App. LEXIS 12595 (7th Cir., June 5, 1992), the court ruled that the Delaware indemnification statute applies to suits against directors and officers both

in their official capacity or if the suit arises more tangentially from his role, position or status as a director. In that case, a former director and shareholder of a company were sued for failure to disclose material information when he sold his stock in the company to another corporation. Although he was sued in his capacity as a shareholder (which would not alone trigger indemnification), the court permitted an indemnification claim against the corporation to proceed since his status as a director put him in a position where, in performance of his duties as a director, he either learned or should have learned of the material information which he did not disclose to the purchaser when he sold his stock. *See also, Barry v. Barry, 824 F.Supp. 178 (D.Minn. 1973) aff'd., 28 F. 3d 848 (8th Cir. 1994); U.S. v. Lowe, 29 F. 3d 1005 (5th Cir. 1994), Kapoor v. Fujisawa Pharmaceutical Co., 1994 Del. Super. LEXIS 233 (May 10, 1994); Augat, Inc. v. Collier, 1996 WL 110076 (D. Mass. Feb. 8, 1996).*

Case law supports indemnification is to be decided upon prior to any parties indemnifying themselves, especially if all parties are party to the suit.

*In Redyd v. Electronic Data Systems Corp., No. Civ. A. 19467, 2002 WL 1358761 at *3 (Del. Ch. June 18, 2002)* held that where the bylaws stated that an officer or director "shall be entitled to" indemnification and the advancement of expenses "as, and to the fullest extent, permitted by" "applicable state law, one court has held that a corporation must advance expenses even to a corporate vice president accused of criminal actions solely for his personal benefit.

Bivens and §1983 actions as analogous for most purposes, and "have typically incorporated §1983 law into Bivens actions." *Tavarez v. Reno, 54 F.3d 109, 110 (2d Cir. 1995) (per curiam) (citing Carlson v. Green, 446 U.S. 14, 18-20 (1980)); see also Ayeni v. Mottola, 35 F.3d 680, 688 n.10 (2d Cir. 1994); Ellis v. Blum, 643 F.2d 68, 84 (2d Cir. 1981).* The Supreme Court has made it clear that private corporations engaging in state action may be sued under § 1983. *See Lugar v. Edmonson Oil Co., 457 U.S. 922, 936-37 (1982). See Bivens, 403 U.S. at 407-08 (Harlan, J., concurring)*

Respondents Continuing to Solicit States Help, Against Federal Law, after US Court Of Appeals For Third Circuit's Opinion. After being protected by the State, and acting in accord to the states actions, Respondents, now argue before the State that claims against them should be dismissed, due to immunity, and that the State should ignore the US Court Of Appeals For The Third Circuit's Opinion, when this courts opinion supports the basis for bringing a claim against all Respondents.

Virtually all courts that have acknowledged the existence of aiding and abetting a fraud state that the following are the elements that must be established by the Petitioner:

a. There existed an underlying fraud;

b. The Respondent had knowledge of the fraud; (The State had knowledge of the fraud, and continued to protect Respondents.)

c. The Respondent provided substantial assistance to advance the commission of the fraud. (The State assisted with the Respondents in their commissioning of a fraud, by going against Federal law, which makes these parties State actors.)

See Wight v. BankAmerica Corp., 219 F.3d 79, 91 (2d Cir.2000); In re Worldcom, Inc. Secs. Litigation, 382 F.Supp. 2d 549 (S.D.N.Y. 2005); Vtech Holdings, Ltd. V. Pricewaterhouse Coopers, LLP, 348 F.Supp.2d 255 (S.D.N.Y.2004); Tew, 728 F. Supp at 1560; Thornwood, Inc. vs. Jenner & Block, 799 N.E. 2d 756 (Ill.App. 1st 2003).

9. To determine whether a duty sufficient to support a negligence claim exists, one begins by determining whether the Respondent by its conduct created a foreseeable zone of risk. *See McCain v. Florida Power Corp., 593 So.2d500 (Fla. 1992); Paszamant v. Ret. Accounts, Inc. 776 So. 2d 1049 (Fla. 5th DCA 2001).* Respondents, knew that their was a foreseeable risk, when he going before the Corporation on numerous occasions, informing the Corporation (while being videotaped) that Respondent "Kafader" was the Corporations Attorney, other Respondents Attorney and State Farms attorney (Respondents client and financier). Respondent "Kafader" gave his blessings (supported through court documents), advising others to commit and ratify crimes they committed, in a further attempt to help his client State Farm Insurance Company, with support of the State.

10. *In Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057 (2d Cir. 1977.*

11. The Model Rules Of Professional Conduct clearly mandates that a lawyer cannot represent a client whose business interests' conflict with a lawyer's own interests in the absence of client consent after full disclosure. The burden of proof in such situation is heavily weighted against the attorney. "[A] lawyer must refrain from entering into the transaction unless his client has consented after full disclosure by the lawyer." Id. "Full disclosure" not only means disclosure of the nature of the transaction, but it also means explaining to the client why he or she would benefit from independent counsel and insisting independent counsel be secured. *Petit-Clair v. Nelson, 782 A.2d 960 (N.J. Super. Ct. App.Div. 2001)* clearly supports this to be a violation of the Rules of Conduct. The Appellee attorneys who commissioned the fraud in these courts submitted any proof supporting that they are immune from the acts they committed.

After being protected by the State, and acting in accordance to the states actions, Respondents, now argue before the State that claims against them should be dismissed, due to immunity, and that the State should ignore the US Court Of Appeals For The Third Circuit's Opinion, when this courts opinion supports the basis for bringing a claim against all Respondents.

Respondents violation of a Settlement Agreement, while issues were pending in the US Court Of Appeals, which was never ruled upon, and where Petitioner informed the court to remove counsel as representation on her behalf, in order that the court consider the Motion.

Contract law governs the construction and enforcement of settlement agreements. *See Laserage Tech. Corp. v. Laserage Lab., Inc., 972 F.2d 799, 802 (7th Cir. 1992)*. Under contract law, a binding agreement requires a meeting of the minds or mutual assent as to all material terms. *See SBL Assoc. v. Village of Elk Grove, 247 Ill. App. 3d 25, 31, 617 N.E.2d 178, 182 (1st Dist. 1993)*. Whether the parties had a "meeting of the minds" is determined not by their actual subjective intent, but by what they expressed to each other in their writings. Thus, the parties decide for themselves whether the results of preliminary negotiations bind them, and they do so through their words. *See Empro Mfg. Co. v. Ball-Co Mfg., Inc., 870 F.2d 423, 425 (7th Cir. 1989) citing Chicago Inv. Corp. v. Dolins, 107 Ill. 2d 120, 481 N.E.2d 712, 715 (1985)*.

The element of consideration was discussed in *Dickey v. Thirty-Three Venturers*. The court in *Sappington v. Miller* Plaintiff contends that Respondents violated the UCC statute of frauds. Under this contract reached the UCC statute of frauds is applied, since, a e-mail and signed confirmation was received making this sufficient writing since it had not been objected to within 10 days or at all, as it was in its original content by Petitioner. These parties qualify as merchants under the UCC. The law should imply a requirement of "good faith and fair dealing" in the contract. As the court of appeals stated in *Boatmen's Bank v. Crossroads West Shopping*.

These Petitioners violated an agreement, when Petitioner refused to sign on to items outlined in a letter documented and signed off by Respondents, contending and agreeing to the only terms agreed upon. All parties had a meetings of the minds, but when Petitioner refused to agree to false information Respondents violated the settlement agreement.

In *Kokkonen v. Guardian Life Ins. Co. of America*, the United States Supreme Court addressed the issue of a diversity action which was settled and a stipulation and dismissal under Rule 41(a)(1)(ii), governing retention

of jurisdiction. The crimes committed herein occurred while this court held and retained jurisdiction.

[Appendix 74a-75a] outlines the terms of the settlement made between one of State Farms attorney's, and **[Appendix 74a-75a]** outlines that the other State Farm Attorney, was informed and aware of a settlement, but all parties refused to adhere to said settlement terms, because Petitioner would not agree to fraudulent terms added after the agreement had been made and terms never discussed.

SUMMARY OF ARGUMENT

Petitioner respectfully ask this court to 1) hold that Respondents were and did act in state 2) reverse the decision of the United States Court of Appeals and remand all issues back to Federal Court For Trial by Jury 3) instruct the courts to rule upon indemnification in accordance to the law 4) Determine if a settlement was made while issues were before the federal courts 5) Award Petitioner costs expended thus far for trying to protect the rights of the Corporation and her family. These Respondents and the State acted jointly in order to deny a right guaranteed by the US Constitution. Even in all Federal Courts a party cannot come before it representing a Corporation, without having counsel, and not to rule upon Indemnification and continue to allow Respondents and the State to block this right, would be a further violation of Petitioner's rights to received due process of the laws, when Petitioner clearly was a Director, and there clearly is an insurance policy in place to protect Directors for preventing such crimes as committed by Respondents. Respondents in this case, and the insurance company all acted based on the States violations and profited and gained from the States violations, and all should be held accountable for the violations committed.

Respectfully submitted,

Cathy D. Brooks-McCollum
PO BOX 12166
Wilmington, DE 19850
(302) 521-1241

Supreme Court, U.S.
FILED
JUN 29 2006
OFFICE OF THE CLERK

06-17 Case No.

(3)

IN THE

Supreme Court Of the United States

CATHY D. BROOKS-McCOLLUM,
Petitioner(s)

v.

Kenneth Shareef, Renford Brevett, Maudy Melville,
Valerie Longhurst, Ruth Vivardis, Mark Martell,
Edward Kafader, Ferry, Joseph & Pearce
Respondent(s)

Appendix To Writ of Certiorari
To The United States Court Of Appeals For The Third Circuit

APPENDIX

Cathy D. Brooks-McCollum (Pro Se)
PO Box 12166
Wilmington, DE 19850
(302) 521-1241

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 5-1264

Brooks-McCollum

vs.

Emerald Ridge Ser, et al.

Cathy D. Brooks-McCollum, Appellant

(Delaware District Civil No. 04-cv-00703)

O R D E R

It appearing that the Bill of Costs submitted by Appellees Ferry, Joseph & Pearce and Edward Kafader in the above-entitled case was due to be received in the Clerk's Office no later than 2/24/06, but was not received until 3/1/06,

It is O R D E R E D that the Bill of Costs be and hereby is denied. See Third Circuit LAR 39.4(a).

For the Court,

/s/ Marcia M. Waldron
MARCIA M. WALDRON
Clerk

Date: 3/1/2006

cc:
Harry Feinberg, Esq. Jonathan L. Parshall, Esq.
Rick S. Miller, Esq.
Ms. Cathy D. Brooks-McCollum

NOT PRECEDENTIAL
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 05-1264
CATHY D. BROOKS-MCCOLLUM. on behalf of
Emerald Ridge Service Corporation
Derivative Action as a Director,
Appellant

v.

EMERALD RIDGE SERVICE CORPORATION
BOARD OF DIRECTORS, Excluding Plaintiff;
KENNETH SHAREEF; RENFORD BREVETT;
MAUDY MELVILLE; VALERIE LONGHURST;
MARK MARTELL; RUTH VIVARDIS;
FERRY JOSEPH &. PEARCE; EDWARD KAFADER
Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 04-cv-00703
District Judge: Honorable Joseph J. Farnan, Jr.
Submitted Under Third Circuit LAR 34,1(a)
December 8, 2005
Before: RENDELL, FISHER and GREENBERG, Circuit Judges(Filed:
February 10, 2006)
OPINION OF THE COURT

RENDELL, Circuit Judge.

This case arises out of a dispute between Cathy Brooks-McCollum. a resident of the Emerald Ridge residential development in Bear, Delaware, and the Board of Directors of the corporation that manages the development, Emerald Ridge Service Corporation ("Emerald Ridge). Brooks-McCollum originally sued the directors in the Delaware Court of Chancery and Delaware Superior Court. alleging various breaches of the directors' fiduciary duties to the corporation. After the Chancery Court denied Brooks-McCollum's motion for advancement of legal fees from Emerald Ridge for the cost of pursuing her claims, Brooks-McCollum filed the complaint in this case against the board of directors of Emerald Ridge, the individual directors and the attorney and law firm that represented the directors before the Delaware Chancery Court. The District Court dismissed her claims for lack of subject matter jurisdiction. and she now appeals. We will affirm.

Brooks-McCollum asserts that the District Court had federal question jurisdiction. Yet her complaint alleges quintessential state law

causes of action: slander, violations of provisions of the Delaware criminal code, questions of corporate governance, and violations of the Delaware Code of Professional Conduct. Her citation of various

It is unclear whether Brooks-McCollum also appeals the District Court's denial of her motion to amend her complaint. In any event. we find that the District Judge acted within his discretion when he denied the motion because Brooks-McCollum failed to comply with local rules requiring, the plaintiff to provide the court with a copy of the proposed amendments. See Lake v. Arnold. 232 F.3d 360, 374 (3d Cir. 2000) (concluding that failure to provide a draft amended complaint would be an adequate basis on which" a district court could deny plaintiffs motion to amend).

Constitutional and federal statutory provisions do not transform these state law claims into causes of action "arising under" the Constitution or federal law. 28 U.S.C. § 1331. As the District Court properly noted, the statutes that Brooks-McCollum cites are largely irrelevant-they are either non jurisdictional, e.g.. 28 U,S.C. 1391, 1401 (regarding venue), or unrelated to the allegations of her complaint, e.g., 28 U.S.C, § 1357 (jurisdiction over revenue and voting rights cases); id. at § 1344 (jurisdiction over election disputes): id. at § 1350 (jurisdiction over alien tort claims).

Brooks-McCollum's appeals to the Constitution are similarly unavailing. The Supreme Court has repeatedly "insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982). Thus.

[T]he party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. The defendants in t[illegible] case, the hoard and individual directors of a private corporation, and their attorneys. do not in any way qualify as "state actors."

"The person asserting, jurisdiction bears the burden of showing that the ease is properly before the court at all stages of the litigation", Packard v. Provident Vat 7 Bark, 994 F.2d 1039, 1045 (3d Cir. 1993). Because Brooks-McCollum has not set forth any basis upon which we could conclude that the District Court had, jurisdiction, we will affirm the dismissal of her complaint.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 5-1264

Brooks-McCollum

Vs.

Emerald Ridge Ser, et al.

Cathy D. Brooks-McCollum, Appellant

(Delaware District Civil No. 04-cv-00703)

ORDER

It appears that the Bill of Costs submitted by Appellees Ferry, Joseph & Pearce and Edward Kafader in the above-entitled case was due to be received in the Clerk's Office no later than 2/24/06, but was not received until 3/1/06

It is ORDERED that the Bill of Costs be and hereby is denied. See Third Circuit LAR 39.4 (a).

For the Court,

/s/ Marcia M. Waldron
MARCIA M. WALDRON
Clerk

Date: 3/1/2006
Cc: Harry Feinberg, Esq.
Jonathan L. Parshall, Esq.
Rick S. Miller, Esq.
Ms. Cathy D. Brooks-McCollum

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
No. 5-1264
Brooks-McCollum v. Emerald Ridge Board Of Directors

To: Clerk

1) Motion by Pro Se Appellant to Amend Caption

The foregoing Motion is denied. Pursuant to F.R.A.P. 12(1), the clerk is required to docket the appeal under the title of the district court action.

For the Court,

/s/ Marcia M. Waldron
Clerk

Dated: August 5, 2005
Tyw/cc: Ms. Cathy D. Brooks-McCollum
Harry Feinberg, Esq.
Rick S. Miller, Esq.
Jonathan L. Parshall, Esq.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
No. 05-1264
Brooks-McCollum v. Shareef

To: Clerk

1) Motion for Reconsideration of Stay

The foregoing Motion is denied.
For the Court,

/s/ Marcia M. Waldron
Clerk
Dated: February 8, 2005
tyw/cc: Ms. Cathy D. Brooks-McCollum Jonathan L. Parshall, Esq.
Robert K. Pearce, Esq.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
No. 05-1264

Emerald Ridge Service Corp. v. Shareef

To: Clerk

1) Motion to Appoint Counsel and/or Allow Appellants Time to Locate Counsel and Allow Appellants to Utilize a Pennsylvania Attorney and Stay Proceedings Until Such Time the District Court Rules Upon Indemnification Pursuant the State Farm Insurance Policy of All Parties in These Proceedings

The foregoing Motion is denied insofar as the corporate appellant is requesting the appointment of counsel. The Court may not appoint counsel to represent the corporation. Rowland v. California Men's Colony, Unit II, Men's Advisory Council, 506 U.S. 194 (1993).

In no event will the non-corporate appellant be allowed to represent the corporation in proceedings before this Court. Simbraw, Inc. v. United States, 367 F.2d 373 (3d Cir. 1966). See also United States v. Cocivera, 104 F.3d 566 (3d Cir. 1996). A corporation may appear in this Court only through counsel who has been admitted to the Court's bar.

The motion for appointment of counsel as to the non-corporate appellant is also denied. This denial is without prejudice to filing a new motion accompanied by a motion for leave to proceed in forma pauperis and a properly completed affidavit in support of that motion in the form specified by the Federal Rules of Appellate Procedure. Counsel may be appointed only to represent a party who has demonstrated that they are indigent.

Should a new motion for appointment of counsel be filed on behalf of the non-corporate appellant, the motion must specify the issues which are to be raised on appeal

And demonstrate why the appellant is unable to adequately present those issues as to herself.

The motion to permit a Pennsylvania attorney to appeal in the appeal is denied as unnecessary. Any attorney who is a member of this Court's bar may appear in an appeal regardless of place of residence or place of primary office.

The motion for stay is denied except insofar as the appeal is stayed for thirty (30) days in order to allow the appellant an opportunity to retain counsel. Should counsel not enter an appearance on behalf of the Corporate appellant within that time, the appeal will be dismissed as to that appellant for failure to prosecute pursuant to Third Circuit Local Appellate

Rules Misc. 107.2 without further notice since a corporation may proceed in this Court only through an attorney who is a member of the Court's bar.

For the Court

/s/ Marcia M. Waldron
Clerk

Dated: January 31, 2005
Tyw/cc: Ms. Cathy Brooks-McCollum
Jonathan L. Parshall, Esq.
Robert K. Pearce, Esq.
Jonathan L. Parshall, Esq.
Robert K. Pearce, Esq

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No, 04703 JJF

CATHY D. BROOKS -MCCOLLUM, Plaintiff,
v.
EMERALD RIDGE SERVICE CORP. BD. OF DIR., et al., Defendants

MEMORANDUM ORDER

Pending before the Court is Plaintiff's Motion For Reargument And Correction Of District Court's Error. (D.I. 61.) For the reasons set forth below, the Court will deny the Motion.

By her Motion, Plaintiff requests the Court to reconsider that portion of its Order dated August 25, 2005 (D.I 60) denying Plaintiff's previous Corrective Motion (D.I. 52). By that Motion, Plaintiff had requested the Court to amend the caption of the pleadings to show Emerald Ridge Service Corporation as a plaintiff rather than a defendant, The Court, citing Maldonado v. Flynn, 413 A.2d 1251, 1255 (Del. Ch. 1980), concluded that in a shareholder derivative suit under Delaware law, the corporation is named as a nominal defendant. Therefore, the Court denied the Motion.

Motions for reargument or reconsideration "should be granted sparingly" and may not be used merely to repeat arguments that

Have already been briefed by the parties and considered and decided by the Court. Ciena Corp. v. Corvis Corp., 352 F.Supp.2d 526, 528 (D. Del. 2005). In the instant Motion, Plaintiff's argument is essentially the same as the one she presented in her original Corrective Motion (D.I. 52). Therefore the Court having already considered Plaintiff's argument and decided the issue, will deny the Motion.

NOW THREFORE, IT IS HEREBY ORDERD that Plaintiff's Motion For Reargument And Correction Of District Court's Error (D.E. 61) is DENIED.

November 4, 2005

/s/ Joseph J. Farnan Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CATHY D. BROOKS-MCCOLLUM, Plaint
Civil Action No. 04-703 JJF
EMERALD RIDGE SERVICE
CORPORATION
v, KENNETH SHAREEF, RENFORD BREVETT, RUTH VIVARDIS, MAUDY MELVILLE, VALERIE LONGHURST, MARK MARTELL, FERRY, JOSEPH & PEARCE, EDWARD E. KAFADER,

Defendants.

MEMORANDUM ORDER

On January 11, 2005, the Court issued a Memorandum Opinion (0.I. 47) and Order D.I. 48) granting Defendants' Motions To Dismiss (D.I. 34 and 37) for lack of federal subject matter jurisdiction. Subsequently. Plaintiff filed the following four motions. For the reasons discussed, the Court deny the Motions.

I. Plaintiff's Motion To Correct The Content Of The Paragraph Labeled Background (D.I. 49)

Plaintiff has filed a Motion To Correct The Content Of The Paragraph Labeled Background (D.I. 49). Because Plaintiff restates this Motion in her subsequent Corrective Motion (D. 52), the Court will address this contention below with the Corrective Motion.

II. Plaintiff's Corrective Motion (D.I. 52) Plaintiff's Corrective Motion (D.I. 52) contains the following requests.[1]

A. Plaintiff's request that the Court correct the caption

Plaintiff requests that the Court amend the caption of the pleadings such that "Plaintiff" is changed to "Plaintiff(s)" to include Emerald Ridge Service Corporation. The Court concludes, however, shareholder derivative action brought under Delaware law, the corporation is named as nominal defendant, rather than as a plaintiff. Maldonado v. Flynn, 413 A.2d 1251, 1255 (Del. Ch, 1980), rev'd on other grounds, Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981). Further, the Court notes that the

[1] Defendant's construe Plaintiff's corrective motions as motions to alter or amend judgment and contend that they are untimely filed because they were required to be filed within 10 days of the docketing of the Court's January 11, 2005 order. However, the Court's January 11, 2005 Order was not docketed until January 14, 2005, and there was a federal holiday on January 17, 2005. Accordingly, Plaintiff's motions, if construed as Rule 59(e) motions, were due on January 31, 2005, and thus, they are timely.

captions the Complaint as it was filed. Accordingly, the Court will deny Plaintiff's request to amend the case caption.

B. Plaintiff's request that the Court correct is Order denying Plaintiffs' Motion to Amend

In its January 11, 2005, Memorandum Opinion and Order, the Court denied Plaintiffs Motion To Amend Complaint (0.1. 44) for failing to comply with the requirement of Local Rule 15.1. Plaintiff contends that the Court should correct the Order because (1) the Court's January 11,2005, Memorandum Opinion treated the Complaint as amended and (2) Plaintiff complied with Rule 15.1 because she included the amendments in her Civil Cover Sheet and in her brief. The Court concludes, however, that Plaintiff did not comply with Rule 15.1, because her Motion failed to enclose a copy of the pleading as proposed to amend. Accordingly, the Court will deny Plaintiff's request for correction.

C. Plaintiff's request. that the Court correct the section of the Memorandum Opinion entitled Background

In the Background section of its January 11, 2005, Memorandum Opinion, the Court referred to Plaintiff as a "former" member of the Board. Plaintiff contends that she is a current member of the Board and that the Memorandum Opinion should be revised to reflect this fact. The Court concludes that the reference to Plaintiff as a former member of the Board is not critical to the Court's decision, and therefore, the Court will deny Plaintiff' s request for a correction of the Court's decision.

D. Plaintiff's request that. the Court correct its opinion private individuals cannot be sued as part of the violations committed by Defendants

Next, Plaintiff contends that the Court's January 11, 2005, Memorandum Opinion erroneously held that private individuals cannot be sued under 42 U.S.C. § 1983. Because Plaintiff restates this contention in her subsequent Motion For Reconsideration Of Stay (P.1. 53) the Court will address this issue in full in its discussion of the Motion for Reconsideration of Stay.

E. Plaintiff request that the Court rule on if Delaware Court has jurisdiction over Plaintiff's state law claims

Finally, Plaintiff contends in her Corrective Motion that the Court should rule on which Delaware Court has jurisdiction over Plaintiff's state law claims. The Court, however, has ruled that it does not have subject matter jurisdiction over the instant action. Thus, the Court cannot direct Plaintiff to a Delaware state court that may have jurisdiction over Plaintiff's state law claims. Accordingly, the Court will deny Plaintiff's request.

III. Plaintiff's Motion For Reconsideration Of Stay (D.I. 53)

Plaintiff also filed a Motion For Reconsideration Of Stay contending that the Court erred in its decision that private individuals

cannot be sued under section 1983. Plaintiff, however, misunderstands the Court's reasoning. Plaintiff is correct that a section 1983 claim may be brought against an individual. However, such a claim requires the individual to have been acting under "color" of state law when the alleged deprivation of the constitutional right occurred. Gonzaga Univ. vs. Doe, 536 U.S. 273, 284-85 (2002) (recognizing that Section 1983 is not a source of substantive rights, but a means to redress violations of federal law by state actors) . Plaintiff has failed to establish that the individual Defendants were state actors or that they acted under color of state law[2] Accordingly. the Court deny Plaintiff's Motion For Reconsideration.

IV. Plaintiff's Motion To Correct (D.I. 54)

Finally, Plaintiff filed a Motion To Correct (D.I. 54) contending that the Court should change the caption of the case to read "Cathy D. Brooks-McCollum & for Emerald Ridge Service Corporation (Derivative)." For the reasons discussed earlier,

Court will deny Plaintiff's request to amend the caption of this action.

NOW THEREFORE, IT IS HEREBY ORDERED this (8th day of August 2005, that:

1. Plaintiff's Motion To Correct The Content Of The Paragraph Labeled Background (D.I. 49) is DENIED.
2. Plaintiff's Corrective Motion (D.I. 52) is DENIED.
3. Plaintiff's Motion For Reconsideration Of Stay (D.I. 53) is DENIED.
4. Plaintiff's Motion To correct (D.I. 54)

Plaintiff cites to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Under Bivens, an individual may be sued for unconstitutional conduct, if the conduct was committed by an individual as a federal official acting under color of federal law. However, Plaintiff has made no allegations to support a Bivens claim.

/s/ Joseph J. Farnan, Jr.
UNITED STATES DISTRICT JUDGE

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[2] Plaintiff cites to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Under Bivens, an individual may be sued for unconstitutional conduct, if the conduct was committed by an individual as a federal official acting under color of federal law. However, Plaintiff has made no allegations to support a Bivens claim.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Civil Action No. 0,4-703 JJF

CATHY D. BROOKS-MCCOLLUM,
Plaintiff,
v.
EMERALD RIDGE SERVICE CORPORATION, KENNETH SHAREEF, RENFORD BREVETT, RUTH VIVARDIS, MAUDY MELVILLE, VALERIE LONGHURST, MARK MARTELL, FERRY, JOSEPH & PEARCE, EDWARD F. KAFADER,

Defendants.

Cathy D. Brooks-McCollum, Bear, Delaware. Pro se Plaintiff.
Jonathan L. Parshall, Esquire, of MURPHY SPADARO & LANDON, Wilmington, Delaware.
Attorneys for Defendants Emerald Ridge Service Corporation, Kenneth Shareef, Renford Brevett, Ruth Vivardis, Maudy Melville, Valerie Longhurst, and Mark Martell.

Robert K. Pearce, Esquire, and Rick S. Miller, Esquire, of FERRY, JOSEPH & PEARCE, PA, Wilmington, Delaware.
Attorneys for Defendants Edward F. Kafader and Ferry, Joseph & Pearce, PA.

MEMORANDUM OPINION

January 11, 2005
Wilmington, Delaware

/s/ Farnan, District Judge

Pending before the Court are (1) Defendants Emerald Ridge Service Corporation Board of Directors, Kenneth Shareef, Renford Brevett, Maudy Melville, Valerie Longhurst, Mark Martell, And Ruth Vivardis Motion To Dismiss Or Remand For Lack Of Federal Jurisdiction (D.I. 34) and (2) Defendants Edward F. Kafader and Ferry, Joseph, & Pearce, P.A. Motion To Dismiss the Complaint (D.I. 37). For the reasons discussed, Defendants' Motions will be granted.

BACKGROUND

Plaintiff Cathy Brooks-McCollum is a former officer and director of the Emerald Ridge Service Corporation (the "Corporation). Following a vote by the Corporation's Board of Directors to remove Plaintiff as an officer, Plaintiff filed a complaint in the Delaware Court of Chancery. Plaintiff subsequently filed a complaint in the Delaware Superior Court, which the Superior Court dismissed with prejudice. Plaintiff filed the instant action against Defendants on behalf of the Corporation.

PARTIES' CONTENTIONS

By their motions, Defendants contend that the Court lacks subject matter jurisdiction over Plaintiff's claims. Defendants contend that: (1) the parties lack complete diversity; and (2) Plaintiff has not alleged a federal question.

In response, Plaintiff concedes she lacks federal diversity jurisdiction (D.I. 39 at 9, 1 18), but cites several federal laws in support of federal question jurisdiction, including the First, Fifth, Sixth, Seventh, and Fourteenth Amendments; 28 U.S.c § 1401; 28 U.S.C. §§ 87, 97, and 85; Federal Rule of Civil Procedure 38; 18 U.S.C. §§ 1964 and 1965 (the "RICO statute"); 42 U.S.C. § 1985; 18 U.S.C. §§ 241, 245; 28 U.S.C. §§ 1335, 1343, 1344, 1350, 1357, 1367, 1391, 1401; 42 U.S.C. § 1971; 15 U.S.C. §§ 77v(a), 78u(e), and 78aa (the "Securities Exchange Act"); and 18 U.S.C. §§ 1952, 1957, and 1959.

DISCUSSION

Before determining the merits of the case, a district court must determine whether it has subject matter jurisdiction. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998). Challenges to subject matter jurisdiction may be racial or factual attacks. When a defendant attacks subject matter jurisdiction on the allegations on the face of the complaint, as is the case here, the challenge is a facial attack. Carpet Group Int'l v. Oriental Rug Importers Assn, 227 F.3d 62, 69 (3d Cir.2000). When examining a facial attack to subject matter jurisdiction, the court must accept plaintiff's allegations as true, and not look beyond the face of the complaint to determine jurisdiction. Mortenson v. First Fed. Say. and Loan Ass'n, 549 F.2d 884,891 (3d Cir.1977). The party asserting subject matter jurisdiction has the burden of proving its existence. Carpet

Group Int'l, 227 F.3d at 70.

Federal subject matter jurisdiction is generally premised on two grounds: (1) a federal question involving the Constitution or laws of the United States, or (2) diversity of citizenship. See 28 U.S.C. §§ 1331 and 1332. In this case, Plaintiff alleges federal question jurisdiction. (D.I. 39 at 9, 18.)

Federal courts have federal question jurisdiction over "cases in which a well pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends

on resolution of a substantial question of federal law." Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983).

The Court concludes that none of the statutes or other authorities cited by Plaintiff establishes federal subject matter jurisdiction. Many of the authorities cited by Plaintiff relate to topics other than jurisdiction, including venue (e.g., 28 U.S.C. § 1401), the location of courthouses (e.g., 28 U.S.C. §§ 87, 97, and 85), the Sixth Amendment right to a speedy and public trial in a criminal prosecution, the Seventh Amendment right to a jury trial, and criminal violations (e.g., 18 U.S.C. §§ 241, 245, 1344, 1952, 1957, and 1959). Other statutes cited by Plaintiff concern issues entirely unrelated to the allegations of the Complaint, for example, the collection of taxes (28 U.S.C. § 1357); the right to vote in elections (e.g., 28 U.S.C. § 1344, 42

U.S.C. § 1971); and actions by an alien for violations of the law of nations or of a treaty (e.g., 28 U.S.C. § 1350).

Plaintiff's assertion of supplemental jurisdiction pursuant to 28 U.S.C. § 1367 is without merit as supplemental jurisdiction requires an independent basis for federal jurisdiction. Also, Plaintiff does not allege facts in her Complaint with the particularity required to establish federal question jurisdiction by virtue of a violation of the RICO statute, 42 U.S.C. 1985, or the Securities Exchange Act. Finally, the Plaintiff's attempt to assert claims under the First, Fifth, and Fourteenth Amendment do not authorize federal question jurisdiction because those Amendments apply only to state action, not action by private individuals or entities. See Avallone v. Wilmington Medical Ctr., Inc., 553 F.Supp. 931 (D.Del. 1982).

CONCLUSION

For the reasons discussed, the Court will grant Defendants' Motions to Dismiss (D.I. 34, 37).1

An appropriate Order will be entered.

'Plaintiff's recent Motion to Amend Complaint (D.I. 44) will be denied as it fails to comply with the requirement of Local Rule 15.1 to enclose a copy of the pleading as proposed to amend.

IN THE UNITED STATES DISTRICT COURT FOR DISTRICT OF DELAWARE

CATHY D. BROOKS-MCCOLLUM,
Plaintiff,
v. Civil Action No. 04-703 JJF
EMERALD RIDGE SERVICE CORPORATION, KENNETH SHAREEF, RENFORD BREVETT, RUTH VISVARDIS, MAUDY MELVILLE, VALERIE LONGHURST, MARK MARTELL, FERRY, JOSEPH & PEARCE, EDWARD F. KAFADER,
Defendants.

ORDER

At Wilmington, this 11th day of January 2005, for the reasons set forth in the memorandum Opinion issued this date;
IT IS HEREBY ORDERED that:

1) Defendants' Emerald Ridge Service Corporation Board of Directors, Kenneth Shareef, Renford Brevett, Maudy Melville, Valerie Longhurst, Mark Martell, And Ruth Vivardis Motion To Dismiss Or Remand For Lack Of Federal Jurisdiction (D.I. 34) is GRANTED;

2) Defendants' Edward F. Kafader and Ferry, Joseph, & Pearce, P.A. Motion To Dismiss the Complaint (D.I. 37) is GRANTED;

3) All other pending motions are DENIOED as moot.

January 11, 2006 /s/Joseph J. Farnan, JR.
UNITED STATES DISTRICT COURT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CATHY D. BROOKS-MCCOLLUM, on, behalf of Emerald Ridge Service Corp. Derivative Action as a Director,

Plaintiff,

v. Civil Action No. 04-703-JJF

EMERALD RIDGE SERVICE
CORPORATION BOARD OF DIRECTORS,
KENNETH SHAREEF, RENFORD
BREVETT, MAUDY MELVILLE,
VALERIE LONGHURST, MARK MARTELL,
RUTH VIVARDIS, FERRY JOSEPH & PEARCE
and EDWARD KAFADER,

Defendants.

ORDER

WHERAS, the court conducted a Rule 16 Scheduling Conference on Thursday, September 9, 2004:
NOW THEREFORE, IT IS HEREBY ORDERED that:
1) All motions in this case are STAYED pending a decision on the Defendant's Motions to Dismiss.
2) Plaintiff shall file her Answering Brief(s) to the Motions to Dismiss within thirty (30) days of receipt of the Motions.
3) Defendants shall file a Reply Brief within ten (10) days of receipt of an Answering Brief.

September 14, 2004 /s/ Joseph J. Farnan, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

CATHY D. BROOKS-MCCOLLUM, on, behalf of Emerald Ridge Service Corp. Derivative Action as a Director,

Plaintiff,

v. Civil Action No. 04-703-JJF

EMERALD RIDGE SERVICE CORPORATION BOARD OF DIRECTORS, KENNETH SHAREEF, RENFORD BREVETT, MAUDY MELVILLE, VALERIE LONGHURST, MARK MARTELL, RUTH VIVARDIS, FERRY JOSEPH & PEARCE and EDWARD KAFADER,

Defendants.

ORDER

Plaintiff has filed a letter request to postpone the Rule 16 Scheduling Conference set for September 9, 2004 (D.I. 4).

Pursuant to Fed. R. Civ. P. Rule 16 (a) "the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial...". In this matter, the Court finds that a Rule 16 Scheduling Conference is necessary for establishing early control to efficiently manage the case in preparation for trial and therefore will deny Plaintiff's request.

NOW THEREFORE, IT IS HEREBY ORDERED that Plaintiff's request to postpone the Rule 16 Scheduling Conference is DENIED (D.I. 4). A Scheduling Conference pursuant to Fed. R. Civ. P. 16(b) will be held on Thursday, September 9, 2004 at 3:00 p.m., in Courtroom No. 4B on the 4th Floor, United States Courthouse, Boggs Federal Building, Wilmington, Delaware.

August 31, 2004 /s/ Judge J. Farnan, Jr
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

CATHY D. BROOKS-MCCOLLUM, on behalf of Emerald Ridge Service Corp. Derivative Action as a Director,

Plaintiff,

v. Civil Action No. 04-703-JJF

EMERALD RIDGE SERVICE CORPORATION BOARD OF DIRECTORS, KENNETH SHAREEF, RENFORD BREVETT, MAUDY MELVILLE, VALERIE LONGHURST, MARK MARTELL, RUTH VIVARDIS, FERRY JOSEPH & . PEARCE and EDWARD KAFADER,

Defendants.

ORDER SETTING RULE 16(b)CONFERENCE

IT IS HEREBY ORDERED that a Scheduling Conference pursuant to Fed. R. Civ. P. 16(b) will be held on Thursday, September 9, 2004 at 3:00 p.m., in Courtroom No. 4B on the 4th Floor, United States Courthouse, Boggs Federal Building, Wilmington, Delaware. Parties shall use the attached form of order for the purpose of preparing for the conference.

July 14, 2004

/s/ Joseph J. Farnan Jr.
UNITED STATES DISTRICT JUDGE

COURT OF CHANCERY OF THE
STATE OF DELAWARE

Date Submitted: April 2, 2004
Dated Decided: July 29, 2004

Re: Brooks-McCollum v. Emerald Ridge Service Board Of Directors, et al., - Civil Action No. 147-N

Dear Ms. Brooks-McCollum and Counsel:

Cathy Brooks-McCollum ("Petitioners"), pro se, filed a Motion to Compel Indemnification on March 18, 2004.[3] Petitioner's Motion arises out of claims she filed against certain current and former members of the board of directors ("Respondents") of the Emerald Ridge Service Corporation ("Emerald"). The Court reads Petitioner's self styled Motion to Compel Indemnification as a motion for advancement and for a declaration that she is entitled to indemnification in the circumstances of this case.[4] Petitioners contend she is entitled to advancement from Emerald for the cost of pursuing numerous claims, including: unjust enrichment, breach of fiduciary duty, and slander. In addition, Petitioner's reply papers suggest that the pleadings, which are not yet closed, may include a request for relief under 8 Del. C. §225, as well.

Based on the numerous papers submitted by Petitioners, Respondents' response, and the arguments presented during the hearing on June 24, 204, the Court finds that Petitioners is not entitled to advancement. The Court also will deny without prejudice Petitioner's

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[3] This Court has jurisdiction under 8 Del. C. §145(k) to hear and determine all "actions for advancement of expenses or indemnification" in a summary proceeding. Petitioners brought her motion for indemnification as part of a larger action before any decision as to liability or any significant discovery has occurred. The procedural propriety of Petitioner's motion at this early stage of the litigation is discussed infra.

[4] On July 7, 2004, Petitioners filed a Motion for Reargument on Advancement on Advancement of Fees for Indemnification. In her motion, Petitioners incorrectly stats that, at a hearing on June 24, 2004 the Court "ordered that Petitioners was entitled to indemnification and a written order would be issued." In fact, at the June 24th hearing, the Court only expressed its preliminary view that Petitioners was not entitled to indemnification, it would not be for all of her claims. Petitioner's July 7th motion seeks reargument on the advancement issue. The Court, however, did not render a final ruling on either advancement or indemnification at the June 24th hearing. Consequently, I will treat the Motion for Reargument as an additional submission in support of Petitioner's motion for indemnification and advancement.

motion for a declaration that she is entitled to indemnification, on the ground that it is premature.[5]

I. BACKGROUND

Petitioner was elected a director of Emerald in June of 2003 and was appointed to serve as both Treasure and Secretary.[6] At a December 23, 2003 Board meeting, a unanimous Board voted to remove Petitioners from those positions.[7] Petitioners resigned from the Board on January 15, 2004.[8]

In Petitioners reply papers, Petitioners alleges that she rescinded Petitioners resignation on February 7, 2004, and that she now is the only valid director of Emerald.[9] Respondents' submissions and argument make clear that they dispute Petitioner's status as a current board member and Petitioners claim to be the only valid board member. These issues go to the merits of the underlying dispute and are not ripe for decision at this time. For purposes of the motion for indemnification, it is undisputed that Petitioners was a director of Emerald until January 15, 2004. The Court will assess the motion on that basis. Whether or not Petitioners effectively rescinded Petitioners resignation and the potential ramifications of that action upon Petitioners claim for indemnification cannot be resolved until after the Court addresses the merits of this action.

On January 2, 2004, before she resigned, Petitioners filed Petitioners Complaint in this Court. On February 3, 2004, Respondents moved for a more definite statement. On February 9, 2004, Petitioners filed Petitioners response. In it and numerous other papers, Petitioners alleges that: (1) she was invalidly removed as an officer because Respondent Shareef was not a valid director; (2) Emerald was unjustly enriched by requiring Petitioners to pay for a power washing service to clean community monuments; (3) the Board utilized funds for unauthorized purposes and disregarded the referendum directives made by the members of the corporation; (4) the Board improperly failed to permit inspection of Emerald's books and records; and (5) the Board made intentional, slanderous postings on Emerald's website. On March 5, 2004,

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[5] The Court's decision does not preclude Petitioners from filing a proper action for indemnification at the conclusion of this litigation.

[6] *See* Response to Respondents Reply to Indemnification & Response to Respondents Answer to Petitioner's More Definitive Statement ("PRB") at 17. Unless otherwise noted, the facts recited in this letter opinion are drawn from Petitioner's moving papers, which the Court assumes arguendo to be true. This is without prejudice to Respondents' ability to dispute in later proceedings any facts not otherwise admitted.

[7] *See* Petitioner's Response to Motion for More Definite Statement at 2. Petitioners disputes the validity of her removal. The factual assertions related to that issue, however, are not relevant to this motion.

[8] *See* Respondents' Renewal of Motion For More Definite Statement and Motion for Judgment on Pleadings ("Defs.' Renewal of Motion"), Ex.E.

[9] PRB at 15.

Respondents renewed their motion for a more definite statement and moved for judgment on the pleadings. On March 9, Petitioners filed a self-styled amended complaint to add breach of contract claims against State Farm Insurance Company ("State Farm") and to assert various challenges to the identity of the properly elected directors of Emerald, as well as several other new claims.[10] On March 18, Petitioners filed Petitioners Motion to Compel Indemnification.

In a telephone conference on March 29, 2004, the parties agreed to defer action on Respondents' pending motions and Petitioner's purported amended complaint until after Petitioner's Motion to Compel Indemnification was briefed and resolved. The Court provided its preliminary views on the advancement issues during a hearing on June 24, 2004 on another motion by Petitioners in this action.

II. ANALYSIS

A. Advancement

The Delaware General Corporation Law permits a corporation to advance the costs of litigation to a director.[11] This allowance is permissive, not mandatory.[12] Thus, a corporation is free to limit the terms of advancement and even preclude advancement entirely.

The Emerald bylaws relating to indemnification provide a narrow right to advancement of legal expenses.[13] Specifically, Section 225, subsection 1 of the bylaws provides in pertinent part:

> Right to Indemnification – Each person who was or is made a party or is threatened to be made a party to or is involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (proceeding"), by reason of the fact that he or she or a person for who he or she is the legal representative is or was a Director or officer, employee or agent of the Corporation or is or was serving at the request of the Corporation as a Director or officer…shall be indemnified and held harmless by the Corporation to the fullest extent authorized by the Delaware General Corporation Law, as the same exists or may hereafter be amended…against expenses, liability and loss (Including attorneys fees, judgments, fines… Such right shall be a contract right and shall include the right to be paid by the

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[10] Petitioners has not properly moved pursuant to Chancery Court Rule 15 for leave to file her amended complaint. Yet, she has included the proposed Amended Complaint in previous communications to the Court. Whether some, all or none of the new claims asserted in Petitioner's so-called amended complaint will be allowed remains to be determined.

[11] 8 *Del. C.* §145(e)

[12] See Tafeen v. Homestore, 2004 Del. Ch. LEXIS 38, 44 (2004), noting that corporations can draft narrow advancement bylaws.

[13] Defs.' Renewal of Motion, Ex.D at 14.

> Corporation expenses incurred *in defending any such proceeding* in advance of its final disposition; provided, however, that the payment of such expenses incurred by a Director or officer of the Corporation in his or Petitioners capacity as a Director or officer...shall be made only upon delivery to the Corporation of an undertaking, by or on behalf of such Director or officer, to repay all amounts so advanced if it should be determined ultimately that such Director or officer is not entitled to be indemnified under this section or otherwise.[14]

Thus, Emerald's bylaws set forth two substantive requirements for advancement. First, the expenses must be incurred in "Respondent" a proceeding such as this civil action.[15] Second, the individual requesting advancement must deliver to Emerald an undertaking to "repay all amounts so advanced if it should be determined ultimately that such Director or officer is not entitled to be indemnified."

Petitioners do not meet either or these two requirements. First, she is not defending this lawsuit; in fact, she initiated it. In Petitioners reply papers, Petitioners seems to argue that the advancement rights provided by the bylaws necessarily extend to every situation under which the bylaw might authorize indemnification.[16] The advancement explicitly is limited to persons "defending" an action. The language in the bylaws defining the scope of indemnification arguably might have broader application. For example, read most broadly, Section 25 would afford indemnification rights to: "Each person who was or is made a party or is threatened to be made a party to or is involved in any action, suit or proceeding...by reason of the fact that he or she... is or was a Director or officer, employee or agent of the Corporation." Whether or not Petitioners ultimately might qualify for indemnification under Section 25 as to some aspect of Petitioners claims, the Court concludes that the narrower language on advancement precludes Petitioners from receiving an advancement of Petitioners costs and expenses in this action.[17]

A second and independent basis exists for denying Petitioner's application for advancement. The bylaws require that she submit to the Corporation a formal undertaking to repay. Petitioners presented no evidence that she ever supplied the requisite undertaking. In fact, Petitioners reply papers indicate that Petitioners denies that the requirement

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[14] Id., Ex. D (emphasis added).
[15] Id., Ex. D at 13
[16] PRB at 4.
[17] Petitioners also argues that she is "defending the accusations as a Petitioners wrongly accused." PRB at 20-21. Having considered the allegations in Petitioner's complaint and her moving papers, the Court is not convinced that there is any legitimate basis for characterizing her position in this litigation as one of "defending" within the meaning of the Emerald bylaws.

to agree to repay advanced funds applies to Petitioners.[18] Petitioner's rationale is that Petitioners case on the merits as to the proper makeup of the board is so strong that there is no possibility that she ultimately will be determined not to entitled to indemnification. The Courts rejects this excuse for not providing the requisite undertaking.

For both the above reasons, Petitioners has failed to prove a right to advancement. Thus, the Court will deny that aspect of Petitioners motion.

B. Indemnification

In Petitioners Motion to Compel Indemnification and Petitioners argument on June 24, 2004 Petitioners has requested a ruling on Petitioners claimed right to indemnification. Even at this preliminary stage of the litigation, it seems clear that on at least some of Petitioners original claims and potential new claims in the proposed amended complaint, Petitioners will not be entitled to indemnification. For example, Petitioners claim of slander does not arise out of an obligation or duty to the corporation. Petitioners make this claim on Petitioners own behalf, asserting Petitioners personal rights, rather than as part of Petitioners responsibilities and duties as a director. To the extent indemnification might arguably be authorized by Emerald's bylaws in connection with a particular claim, that claim by Petitioners would have to arise out of Petitioners duty to the corporation.[19] Hence, Petitioners claim for slander would not be indemnifiable.

As to the remaining claims, Petitioner's right to indemnification evidently will be challenged on several grounds, including that she commenced this litigation unlike most litigants who seek indemnification in their role as Respondents. The Delaware courts only rarely have authorized indemnification of Petitioners.[20] Whether the Emerald bylaws and the holdings in those cases provide a basis for granting indemnification

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[18] PRB at 11-12

[19] Shearin v. E.F. Hutton Group, Inc., 652 A.2d 578, 594 (Del. Ch. 1994) citing Hibbert v. Hollywood Park, Inc., 457 A.2d 339, 344 (Del. 1983) ("Thus, I take Hibbert to recognize that permissible indemnification claims will include those deriving from lawsuits brought by directors, officers, agents, etc., only insofar as the suit was brought as part of the employee's duties to the corporation and its shareholders.") The Court further stated that claims for slander or breach of contract, similar to the claims raised by Petitioners, do not arise out of duty to the corporation and are not thus not indemnifiable: "The suits brought by [Petitioners{...cannot be considered a manifestation of her responsibilities to [the indemnifying entity]. These suits plainly sought to advance [Petitioner's] own interest, not the interest of the [the indemnifying entity]...the litigation involves purely the assertion of Petitioner's personal rights (i.e., defamation, breach of contract), and thus advances no interest of, or duty to, [the indemnifying enty]." *Id.*

[20] See Shearin v. E.F. Hutton Group, 652 A.2d 578 and Hibbert v. Hollywood Park, 457 A.2d 339.

to Petitioners in the circumstances of this case is likely to be hotly contested.[21]

It would be premature, however, for the Court to attempt to address those issues before the questions of liability are determined. Apart from the issue of advancement addressed above, courts understandably tend to defer deciding whether a party is entitled to indemnification until after the merits of the underlying dispute have been resolved.[22] The additional facts that the pleadings in this action are still incomplete and virtually no discovery has occurred yet underscore the inadvisability of addressing indemnification at this time.

Accordingly, to the extent Petitioner's motion seeks an immediate ruling on the indemnification question, the Court denies that aspect of the motion without prejudice on the grounds that it is premature and seeks an impermissible advisory opinion.

III. CONCLUSION

For the foregoing reasons, Petitioner's Motion to Compel Indemnification, more accurately classified as a request for advancement, is DENIED. IT IS SO ORDERED.

Sincerely,
/s/Donald F. Parsons Jr.
Vice Chancellor

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[21] See, e.g., Respondents' Response to Petitioner's Motion to Compel Indemnification.

[22] See 8 Del. C. §145© ("To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding...or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such persons in connection therewith.").

IN THE COURT OF CHANCERY O F THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CATHY D. BROOKS-MCCOLLUM

No. 147-N

Petitioners Below,
Petitioners,
v.

EMERALD RIDGE
SERVICE CORPORATION
BOARD OF DIRECTORS,
KENNETH SHAREEF,
RENFORD BREVETT,
MAUDY MELVILLE,
VALERIE LONGHURST
Respondents,

Court Below-Court Of Chancery
of the State of Delaware,
in and for New Castle County
C.A. No. 147-N

ORDER

The Court having received Respondent's Motion for a More Definite Statement pursuant to Court of Chancery Rule 12(e), and preferring that the motion be briefed and presented promptly, IT IS HEREBY ORDERED this 4th day of February, 2004, as follows:

1. Petitioners shall file a response to the Motion for a More Definite Statement on or before February 20, 2004, and Respondents reply in support of the Motion shall be filed on or before March 5, 2004; or

2. If Petitioners elects not to oppose the Motion, she shall file an amended complaint on or before March 1, 2004 addressing the concerns stated in the Motion for a More Definite Statement.

/s/Donald Parsons, Jr.

Vice Chancellor

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

CATHY D. BROOKS-MCCOLLUM

No. 147-N

Petitioners Below,
Petitioners,
v.

EMERALD RIDGE SERVICE CORPORATION BOARD OF DIRECTORS, KENNETH SHAREEF, RENFORD BREVETT, MAUDY MELVILLE, VALERIE LONGHURST
Respondents,

Court Below-Court Of Chancery of the State of Delaware, in and for New Castle County C.A. No. 147-N

ORDER

On the basis of Respondents' letter to the Court of January 30, 2004 requesting an extension of time to respond to the Complaint, and there appearing to be good cause shown for the request, the above listed Respondents shall have until March 1, 2004 to move, answer or otherwise plead in response to the Complaint in this action. If Petitioners objects to this Order, she shall notify the Court, in writing, on or before February 10, 2004.

IT IS SO ORDERED.

/s/Donald Parsons, Jr.
Vice Chancellor

IN THE COURT OF CHANCERY O FTHE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

CATHY D. BROOKS-MCCOLLUM

No. 147-N

Petitioners Below,
Petitioners,
v.

ERSC
Board Of Directors,
Kenneth Shareef,
Renford Brevett,
Maudy Melville,
Valerie Longhurst
Respondents,

Court Below-Court Of Chancery
of the State of Delaware,
in and for New Castle County
C.A. No. 147-N

REPLY TO PETITIONERS'S RESPONSE TO MOTION FOR MORE DEFINITE STATEMENT AND FOR JUDGMENT ON THE PLEADINGS

The Respondent hereby makes the following reply to Petitioner's response to Respondent's motion for a more definite statement, or alternatively, motion for judgment on pleadings. In Petitioner's response to Respondents' motion, Petitioners asserted that the March 2, 2004 Board of Directors meeting was not a validly constituted board of directors of the Corporation. In order to try to clarify the current membership of the board of directors, the Respondents submit the following:

In May of 2003, the Board consisted of the following individuals: Valerie Longhurst, Kenneth Shareef, Terry McCormick, John Garurrello and Thomas Laughery. In June of 2003 elections were held. The board believed that there were three open slots, which needed to be filled at the time. Kenneth Shareef and Valerie Longhurst were believed to be holdovers. Therefore, an election to three open slots was held in June of 2003.

Four nominees were obtained for the three open slots. Those nominees were Patricia McClurg, Ruth Visvardis, Cathy Brooks-McCollum and Maudy Melville. The three slots were to be filled by the top three vote getters. Those top three vote getters were Patricia McClurg, Ruth Visvardis, and Cathy Brooks-McCollum.

At the initial meeting in the newly constituted board, Ms. Brooks-McCollum indicated that she had been in touch with the attorney for the Corporation. She indicated she had been informed by the attorney for the Corporation that the maximum number of years to which an individual could be elected to the board of directors was two years. Ms. Brooks-McCollum pointed out that Ms. Longhurst had already served a two-year

term. The by-laws provided for a three-year term only for the selection of the original board members. Upon further discussion of the positions as members of the board. This left only Kenneth Shareef and Cathy Brooks-McCollum as members of the Board of directors. Maudy Melville was then contacted by the board and requested to serve as a third member of the Board.

Section 4 of the Corporate by-laws provides that in the event a vacancy on the board is created by reason of death, resignation or otherwise, such vacancies shall be filled for the unexpired term by a majority vote of the remaining directors, even though less than a quorum. Therefore, Cathy Brooks-McCollum and Mr. Shareef were empowered to appoint Ms. Melville as a member of the Board. Even without counting Mr. Shareef as a member of the board, Ms. Brooks-McCollum would have the authority to appoint a new director to the Board.

Renford Brevett was next contacted by the Board (now consisting of Mr. Shareef, Ms. Brooks-McCollum and Ms. Melville) and requested to serve as a Board member. He agreed to do so and his membership on the Board was approved by those Board members.

At the December 29, 2003 Board meeting, Ms. Brooks-McCollum was relieved of Petitioners duties as secretary treasurer of the Board, but remained a Board member.

Mr. Shareef tendered his resignation from the Board at a general meeting of the members of the community held on January 15, 2004, on the same date, Ms. Brooks-McCollum submitted Petitioners resignation from the Board.

At the meeting of the board of directors held on January 15, 2004, which was held immediately after the general membership meeting, Mark Martell was appointed a member of the board of directors, in place of Kenneth Shareef.

At the March 2, 2004 meeting of the board of directors, Ruth Visvardis was appointed to the Board. Ms. Visvardis was also selected to serve as secretary of the Board. AT the same meeting, Mr. Martell was appointed treasurer of the Board.

Attached hereto as Appendix A is a revised copy of the minutes of the March 2, 2004 board meeting. An earlier copy of the minutes of that meeting was submitted as Appendix E to Respondents' exhibits to Respondent's motion for judgment on the pleadings, and renewal of motion for more definite statement. The only change in these minutes is that Mr. Martell was incorrectly identified as Ken Martell. He is correctly identified as Mark Martell in the revised minutes.

.....

.....It is conceded that Mr. Shareef was not validly a member of the Board because he was not a titled landowner in the community.

.....

Date:

/s/Edward F. Kafader ID#246
Edward F. Kafader, Esquire
824 Market Street, Suite 904
Wilmington, DE 19801
(302) 575-1555
Attorney

IN THE COURT OF CHANCERY O FTHE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

CATHY D. BROOKS-MCCOLLUM

No. 147-N

Petitioners Below,
Petitioners,
v.

EMERALD Ridge Service Corporation Board Of Directors, Kenneth Shareef, Renford Brevett, Maudy Melville, Valerie Longhurst
Respondents,

Court Below-Court Of Chancery of the State of Delaware, in and for New Castle County C.A. No. 147-N

RENEWAL OF MOTION FOR MORE DEFINITE STATEMENT AND MOTION FOR JUDGMENT ON THE PLEADINGS

1. STATUS OF CASE

.....

Attached hereto as Appendix F is a copy of the minutes of a Board meeting held on March 2, 2004, At the meeting, the Board voted to ratify all actions taken by the Board between July 27, 2002 and December 29, 2003.....

7. BOARD'S RIGHT TO UTILZE CORPORATION'S FUNDS OUTSIDE THE SCOPE OF THE BYLAWS

.....

Shareef and Longhurst did not read the corporate bylaws, certificate of incorporation or the general corporation of laws of the State of Delaware. It does not appear that this section states any cause of action that could be recognizable by this Court.

.....

Date: 3/05/04

/s/Edward F. Kafader ID#246
Edward F. Kafader, Esquire
824 Market Street, Suite 904
Wilmington, DE 19801
(302) 575-1555

Attorney for Respondents

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

CATHY D. BROOKS-MCCOLLUM

Civil Action No. 147-N

Petitioners Below,
Petitioners,

v.

EMERALD RIDGE SERVICE CORPORATION BOARD OF DIRECTORS, KENNETH SHAREEF, RENFORD BREVETT, MAUDY MELVILLE, VALERIE LONGHURST
Respondents,

Court Below-Court Of Chancery of the State of Delaware, in and for New Castle County C.A. No. 147-N

Chancery Courtroom No. 12C
New Castle County Courthouse
Wilmington, Delaware
Thursday, June 24, 2004
2:00 p.m.

BEFORE: HON. DONALD F. PARSONS, JR., Vice Chancellor
HEARING

CHANCERY COURT REPORTERS
500 North King Street – Suite 11400
Wilmington, Delaware 19801-3759
(302) 255-0525
APPEARANCES:

Cathy D. BROOKS-MCCOLLUM Pro se
EDWARD F. KAFADER, ESQ.
Ferry Joseph & Pearce, P.A. for Respondents

CERTIFICATE

I, DIANE G, McGRELLIS, Official Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 71 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware of the date therein indicated.

IN WITHNESS WHEREOF I have hereunto set my hand at Wilmington, this 13th day of August, 2004.

/s/Diane G. McGrellis
Official Reporter for the Court of
Chancery of the State Of
Delaware

CSR 108-PS
Expires Permanent

THE COURT : All right. Now, you have – you filed a motion to dismiss or for a more definite statement. Right?

MR. KAFADER: Right. There has been a response filed—I think actually two responses filed by Ms. Brooks-McCollum.

THE COURT: Now are you filing a reply?

Mr. KAFADER: No. I'm not going to file anything further, Your Honor. I think maybe the thing to do is for the Court to give some consideration to the motion and Ms. Brooks-McCollum's response to the motion. And that may whittle down some of the issues that the Court is required to deal with here.

THE COURT: Right.

MR. KAFADER: I think that the thing that Ms. Brooks-McCollum has pointed out in Petitioners pleadings, and pointed out from the beginning, I think, of this case—I'm not sure about that—is that there was an issue about Mr. Shareef's ability to serve on the board.

Ms. Brooks-McCollum pointed out—if not in Petitioners first complaint, in one of the amended complaints that she has filed—that Mr. Shareef was not on the deed for the property where he lives. His wife owns the property, only, and there is a requirement in the bylaws that in order to be eligible for service on the board of directors, you have to be a landowner. And I think she correctly points out in Petitioners pleadings that he was not—it is correct that he was not a landowner. He was not on the deed for the property when he was serving as director. And that, I think, is one of the most salient points that she has made in Petitioners pleadings.

And then we are dealt with—what I think the Court may have to deal with is what impact does the fact that Mr. Shareef met—served on the board of directors have on the actions of the board. **There was later—a later meeting of the board. Mr. Shareef resigned in January of this year, and he is off the board. There was a meeting of the board in March by which the board gave its blessing to other actions of the board, validated the actions of the board taken while Mr. Shareef was on the board.** I have done some research in the area, and it appears that that can correct any problems where there is an issue about the ability of one member of the board to serve on the board. But that's something I think the Court is going to have to wrestle with.

Go ahead. I'm sorry.

MS. BROOKS-McCOLLUM: That's not my -- the basis of what my complaint was. My initial basis was based on the fact that the members of the board were not going to follow the laws of the general corporation laws or the laws of the corporation itself. So I went to the Court after they refused to pay for power washing services on my behalf that I was asked to do. So I went to the Court to get my money back, so -- for power washing services, as well as to ask the Court to clarify the laws for the corporation,

so the corporation would know exactly what laws would have to be followed.

As a result of that, and as a result of me being accused and removed from the board -- I guess the assumption why I was removed from the board was I was trying to get them to follow the laws. I have never spoken on the phone to any of those members. I've never had any communications other than communications I sent to them. They refuse to address any of the items that I wanted to bring up.

So basically, at that point, that's when I did further research and found out there was a lot more things that were not being done properly, and addressed those in the complaint. So the complaint would have -- initially had nothing to do with the fact that Mr. Shareef -- in my research, that's what I found out. Mr. Kafader is stating that they basically validated the actions of his since December of 2003. They cannot do that. Mr. Ken Shareef, even if he were a valid board member, he cannot serve on the board. There was a June 2003 meeting -- I mean election. That June 2003 election, if Mr. Shareef even were valid, he would have had to put his name on the ballot. He did not. He was on the -- he was appointed to the board in 2002, without proper identification to make sure he was allowed to be on the board. 2003, the election came up. He just stayed on, as did the case -- what Ms. Longhurst wanted to do. I do have a letter stating that. I brought to Petitioners attention, "You can't stay on. You have to run for office." She got angry and decided not to run for the office. Therefore, all of the persons who were elected to office resigned, and what Mr. Kafader is talking about, about ratifying people, these are all people that were invalid members, appointed after the legal proceeding was filed in the courts.

This is a corporation – the corporation doesn't even know what is going on. They didn't know these people were arbitrarily put on there. We have four appointed persons on the board and one person who resigned as of the January 15th meeting that the community had, who the community thought she was no longer on the board. But she decided now to be on the board, but she never stated that she tendered Petitioners resignation. At the meeting, a lot people were like, "She resigned. Why is she still there?" We have people, basically, that decided, "We have all the people," and that, "We are going to appoint them to our board." That goes against all of the laws of Delaware

THE COURT: What we should do is take up the motion to dismiss or for a more definite statement, as the first item. And I will see, with my secretary, if we can get a time for an argument on that, Is it -- I'm assuming there that you would -□ you are available to come to the Court any present your argument Ms. McCollum?

MS. BROOKS-McCollum: I would really prefer Your Honor first decide on the indemnification, so the lawyer that I basically consulted with can handle this, only because, as--

this, basically, whole situation, to me, is like really ridiculous. It began over $185, and adults have taken the position to retaliate instead of try to work out something, like a normal corporation would do. I don't feel I should have to continue to miss moneys from work and time from work. And basically, I've missed extensive hours away from my two little children because of the fact that people who were not even elected -- and I was elected -- decided to indemnify themselves and not myself.

THE COURT: Okay. So let's -- as far--, as the motion for indemnification and the motion to dismiss, you are okay to have the Court decide that without any argument, just on the papers that have been submitted?

THE COURT: Okay. How about you, Mr. Kafader?

MR. KAFADER: Well, two things, Your Honor: I didn't know if Your Honor would want to put off -- I suppose Ms. Brooks--McCollum could possibly be entitled to indemnification in one of two ways, but I think the way she is looking for this is indemnification under the general corporation laws.

THE COURT: Right.

MR. KAFADER: I haven't really responded to that motion. I thought maybe Your Honor was going to put that off until some decision was made on the other motion. If Your Honor wants a short response on that, I can file a response, I guess, by the end of the week.

THE COURT: Well, why don't -- I think it would be worthwhile, because if the Court is able to determine, for example, that Ms. McCollum is not entitled to indemnification, then she ought to know that. And if she is entitled to

indemnification, then it sounds as though what she really would prefer is to know that, so that she can get an attorney to try to put together a complaint that would pass muster if this current one does not.

MS. BROOKS-McCOLLUM: Correct.

THE COURT: And I don't mean to suggest that I have decided that issue, whether you are entitled to indemnification or not. I haven't looked at that closely yet. But what we usually do is wait to get the other side's response, and after Mr. Kafader puts in his papers saying what his view is with respect to indemnification, you should feel free to put in anything more that you want to, as what we call a reply, Ms. McCollum. We will wait for about a week.

MS. BROOKS-McCOLLUM: Okay.

THE COURT: -- to see if you have anything that you want to put in. If we don't hear from you in a week, we will figure that it's okay for us

to go ahead and decide it. And you know -- but if you want to put something in as far as a reply, you should do that.

MS. BROOKS-McCOLLUM: Okay. Thank you.

MR. KAFADER: Your Honor, there is one other thing that might be helpful. I just remembered this as Ms. Brooks-McCollum was discussing the positions of the various members of the board. There have been several resignations of the board since last June. And maybe it might be helpful for me, as kind of a reply to Petitioners earlier filing, which was in response to my motion for more definite statement or for judgment on the pleadings, to just give the Court some kind of an outline of who is currently on the board, and how it is that the board believes the -- the Respondents believe that they are entitled to serve on the board.

THE COURT: Okay. I think that would be useful. And of course, that will be served on

you, Ms. McCollum. And again, since it's something that you would not have seen before, if you want to submit anything further about that, you are free to do it.

MS. BROOKS-McCOLLUM: I would want to submit something, but I would not want to answer until Your Honor decides on indemnification, due to the fact that I would want an attorney to decide on those iss. es, because of the fact that -- I would think that they would be able to better correlate those things with the Court.

THE COURT: Okay. The risk that you run is if I decide that you are not entitled to indemnification, then that means you are – you either have to continue representing yourself or just let the case go. I guess it's -- it's sort of up to you.

MS. BROOKS-McCOLLUM: I will just continue representing myself.

I will -- I would make a reply to whatever Mr. Kafader responds to, as far as the persons who believe they are entitled to serve on the. board.

THE COURT: Right. Okay.

MS. BROOKS-McCOLLUM: The persons who basically resigned because they didn't want to follow the law.

THE COURT: Right. I agree in terms of the -- as far as if it -- if the Court concludes that you are entitled to indemnification, then it's possible that I would put off for a little while deciding the motion to dismiss, to see if your attorney has anything else to add about that.

THE COURT: Okay. But that sounds like a good plan in terms of your -- if you have something that you think I ought to know about whether these new directors are proper directors or not. After you see what Mr. Kafader says, you might as well go ahead and submit a little reply on that, so I know what your position is.

MS. BROOKS-McCOLLUM: Okay.

THE COURT: All right? Mr. Kafader, what kind of time frame do you think is reasonable for you?

MR. KAFADER: I think by Monday I can submit something to the Court on the issue of indemnification, and also provide the court by Monday I mean next Monday -- with a -- an outline, at least, of who is on first, I suppose. In other words -

THE COURT: Okay. No. I think I understand what you are saying. And Ms. McCollum, what I will figure is I think Thursday of the following week -- the Court is closed on April 9th, I believe. So you ought to plan to -- I want to make sure -

MS. BROOKS-McCOLLUM: I know originally we said something about six weeks. In fairness, as far as indemnification, even under the general corporation law, if the Court -

THE COURT: We can't hear you. You have to speak up.

MS. BROOKS-McCOLLUM: If the corporation gets -- in accordance with the general corporation law, if the corporation has enough votes to basically say these persons are not entitled to indemnification -- because the word of counsel was that he said they should not proceed with indemnification. So the corporation law should decide it. That would not be enough time for me to go back to the members who basically took the position to say -- basically, half of the corporation said these persons -- they had no idea these persons were on the board, how they got on the board. So that, to me, would help me in my -- in determining indemnification, as well, what the corporation is doing, and what they are doing it based on.

THE COURT: I think that really is - I tend to agree with Mr. Kafader that that is sort of a separate issue. You should continue proceeding with respect to that issue now, but that's like - the first issue is whether you are entitled to indemnification or not. And then if you are entitled to indemnification, then maybe we get into whether the insurance company should be paying it and if they are refusing to pay it.

MS. BROOKS-McCOLLUM: I'm mostly interested in whether or not I'm entitled to it as well as they are entitled to it. It's a two-fold motion. I'm interested in whether I'm entitled to it, and these persons, as well.

THE COURT: Right. Part of the problem here is to -- is for the Court, since you don't have the benefit of an attorney, to make sure that the claims that you are raising are really proper claims to be before the Court at this time. And -- but I will look at all that. But what we are -- what we are pointing toward now is that, Mr. Kafader, you will have your papers in by next Monday. What date is that?

MR. KAFADER: Hold on just a second.

MS. BROOKS-McCOLLUM: April 5th. That's April 5th.

THE COURT: Okay. April 5th. I will give until -- what is Friday of the following week? T guess it's like April 16th? April 16th. So April

16th will be the date. To the extent you have anything more you want to submit, Ms. McCollum, you should have it submitted. You should send it in so we get it by April 16th.

MS. BROOKS-McCOLLUM: Okay.

MR. KAFADER: Your Honor, one other thing that I would ask is that these filings we are going to file be the last things we file with the Court until a decision is made by the Court on the issues the Court is going to decide.

THE COURT: Well, that's -- it's my

In sort of clarifies things a little. We will consider that information that was in your longer response, Ms. McCollum.

MS. BROOKS-McCOLLUM: Okay.

THE COURT: We definitely will consider that. And it is a motion for judgment on the pleadings and/or a motion to dismiss. So for the most part, I will decide it just on what allegations have been made. But if it becomes necessary, for me to resolve it; to look at something that was submitted outside of those pleadings, then in that limited sense it will be changed to a motion for summary judgment. So what you have submitted will be considered.

MS. BROOKS-McCOLLUM: Okay. Thank you.

THE COURT: -All right. Okay. Well, then, we will send out a-short order that just indicates these dates of April 5th for Mr. Kafader's answering papers and then April 16th for any replies that are going to be submitted by Ms. McCollum. And then at that point I'm going to treat it as though both sides are willing to have the Court just decide this on the papers that everybody submitted without any oral argument.

If for some reason between now and the 16th somebody changes their mind and wants oral argument, send me a letter saying that you want it. It doesn't mean that I will give oral argument, but at least I'll think about it.

MS. BROOKS-McCOLLUM: Okay.

THE COURT: All right? Thank you.

(Recess at 4:31 p.m.)

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

CATHY D. BROOKS-MCCOLLUM

Civil Action No. 147-N

Petitioners Below,
Petitioners,

v.

EMERALD RIDGE SERVICE CORPORATION BOARD OF DIRECTORS, KENNETH SHAREEF, RENFORD BREVETT, MAUDY MELVILLE, VALERIE LONGHURST
Respondents,

Court Below-Court Of Chancery
of the State of Delaware,
in and for New Castle County
C.A. No. 147-N

In Chambers
New Castle County Courthouse
Wilmington, Delaware
Monday, March 29, 2004
4:00 p.m.

BEFORE: HON. DONALD F. PARSONS, JR., Vice Chancellor
TELEPHONE CONFERENCE FOR SCHEDULING

CHANCERY COURT REPORTERS
500 North King Street – Suite 11400
Wilmington, Delaware 19801-3759
(302) 255-0525

APPEARANCES:

Cathy D. BROOKS-MCCOLLUM Pro se
EDWARD F. KAFADER, ESQ.
Ferry Joseph & Pearce, P.A. for Respondents

CERTIFICATE

I, WILLIAM J. DAWSON, Official Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 26 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware of the date therein indicated.

IN WITHNESS WHEREOF I have hereunto set my hand at Wilmington, this 11th day of, 2004.

/s//William J. Dawson
Official Reporter for the Court of
Chancery of the State Of
Delaware

Certification Number : 197-PS
Expiration : Permanent

that's about.

The main -- the facts that I have at this point -- and I've read your papers and I read the papers from the other side -- show me that there's a dispute, and you disagree about how things have been done. And we'll have to go through and see whether each person was properly elected and those kinds of actions were taken. You have an argument that they weren't.

But I think there's also an argument that all those actions were okay under the Delaware corporation law. We'll have to sort them out one after the other. But as of right now, I don't think that it's more likely that your side's going to win on that than the other side. So, I am not entering any kind of status quo order.

You say that the persons are not authorized to hold an election of new officers, especially themselves; they're not authorized to collect corporate funds. Until I rule on the status of the corporation, that's not correct. The corporation is out there. It is operating. These are the persons who are in charge of it. And it will continue to operate that way until some court -- if it ever does, and that may very well be this Court says that that was wrong: Most likely it's not

going -- I've spoken to Judge Johnston. The kind of actions that m'-ht go forward before Petitioners are for actions.) Like for liability or things like that, deciding who's in charge of a corporation, that's going to get decided in this Court. And then if you disagree with it -- whatever the decision is – then you can take that to the Delaware Supreme Court. But the Superior Court would not .-- they won't decide 1.1 that kind of an issue.

MS. BROOKS-McCOLLUM: That's all I was asking in Superior Court is for the damages that they caused me and my family for living in there.

THE COURT: I understand that Judge Johnston has said that she'll sort of put that on

hold until this Court makes its ruling and then you can go back and pursue those -- the tort claims. I think she realizes that you have tort claims that you can go after in that court.

So at this point, as far as the meeting going forward, the Court -- there is no status quo order in place. There hasn't been any evidence presented at this stage that's sufficient to cause the Court to believe that there's a reasonable likelihood of success that the Petitioners is going to be able to show that the current board is not authorized to hold an election as it has noticed; and likewise, there has been no showing that the current board of directors were invalidly elected or appointed, or in the same position the Petitioners has asserted that they are not properly elected, and the Court will have to hear both sides of that case in a trial at some point. But as of right now, it's not clear that the Petitioners would prevail on that argument, and therefore there is no reason to stop the meeting.

In terms of the elected directors. The Court will note that there was – it seems conceded by the Respondents that former director and Respondent Ken Shareef was not a valid director.

Is that right, Mr. Kafader?

MR. KAFADER: That's correct, Your Honor.

THE COURT: However, he resigned from his position as a director on June – January 15th of 2004.

There also is no evidence to show that the remaining directors -- at least at this stage, Or that the remaining directors are invalid. The remaining board members were all appointed. The initial appointment was of the Respondent director Mandy Melville. That was made by the Petitioners and Respondent Shareef. The bylaws permit the board, by a majority vote, to appoint a director if a position on the board is available due to the resignation of a prior director. The provision does not require a quorum to be present.

MS. BROOKS-McCOLLUM: Can I respond to that?

THE COURT: Yes.

MS. BROOKS-McCOLLUM: The

appointment -- Ken Shareef was the only person that was on the board and myself, not Mandy Melville. At that particular time, Ken Shareef wanted to put some other people on the board. He appointed Renford Brevett and Mandy Melville to the board. So Ken Shareef made those appointments. Mandy Melville was not a part of the appointments made.

THE COURT: You were a member of the board at that time?

MS. BROOKS-MCCOLLUM: Ken Shareef and

this point I won't know who else -- when you say you're suing the Emerald Ridge Service Corporation Board of Directors, if it's not the company -- and I understand you don't mean it to be a company – I don't know who else it is. I'm just going to go forward from today, assuming it isn't anybody else beyond the four people. And if it's only three - the four people you've named are Respondents. No question. If you want any other individuals to be Respondents, then it's important to let the Court know who they are. You don't have to do it this minute. But that's kind of what's going on.

It sounds then like Mr. Kafader is - I mean, his clients -- the four named individual Respondents and Emerald Ridge Service Corporation, and there I'm talking about the people who are controlling it today -- they sort of think they're all on the same side. And I know you disagree. But that's what they thinks So, they don't really have a conflict of interest between them and Mr. Kafader. Consistent with our rules of professional conduct, he can represent the company and these individual Respondents until such time as a conflict of interest arises.

MS. BROOKS-McCOLLUM: The members of the stockholders are members of the corporation. I don't feel Mr. Kafader is working in my best interest as a stockholder.

THE COURT: Right. But as a legal matter, your understanding is incorrect. You are a shareholder. You have certain rights, important rights as a shareholder of a company, one of which is to file a derivative action, which is something that you've done. But the company itself is separate from the shareholders. And when you sue somebody, that's you personally as a shareholder suing. It's not the company.

At this point the company essentially is siding with -- the people who control the company today are siding with the named individual Respondents, Shareef and so on. And so it's okay under our Delaware laws -- the Delaware rules of professional conduct.

MS. BROOKS-McCOLLUM: Did you explain that? I'm not understanding that part. If you're saying that those Respondents are the corporation, how are persons that -- Shareef is no longer on the board. Valerie Longhurst was never on the board. There is a conflict with those two at least. They were not board members.

Then overall, in all -- are you saying that no matter who you elect to the board that they now become the corporation, and the other 140 something people in the corporation have no say? Mr. Kafader can go to this meeting, that is curtailing my case -- now it's like get them on my side. They already lied to members of the corporation. They sat there and lied. So, I might as well just go ahead and throw in the towel the way that this is. I may as well let them put dolls on my car.

I feel I'm being raped in this Court. Here I am. Mr. Kafader is advising them to do legal stuff over and over and over. All I'm doing is getting more upset than I was over the weekend for having a doll with the head cut off. I may as well be in Kuwait the way I feel.

THE COURT: Let's talk about the doll with the head cut off, which is a terrible situation. It's a different issue from what we were talking about, but it's front and center and we need to talk about it now. It's a horrible situation that has occurred. And I assume that you reported it to the police and have taken whatever other action you can with respect to that. But for this Court for me to be able to do something, I need something I need evidence that links one of these four Respondents -- Shareef, Melville, Brevett, Longhurst -- one of those people to doing that, or what you're saying a moment ago that Mr. Kafader is involved in any way in that. I know you may think that,,.- Mr. Kafader is a respected member of the bar.

It's completely out of character that he would ever be anywhere near anything like that, and the Court doesn't suspect that.

MS. BROOKS-McCOLLUM: Because he's a respected member of the bar you respect that. Because I'm a respected citizen, you don't respect

copy of the fax of all the information I was asking him to remove, and they said no.

THE COURT: All right.

Now, what I'm telling you is that what you should be doing at this point is, you should go ahead and get your own attorney.

I can't I'm not guaranteeing that at the end of the day there is going to be indemnification. Your attorney can look at that and then this Court, within the not too distant future, will come out with some little written opinion that will say, based on what I know so far, whether any of your claims look like they might qualify for indemnification. But what usually happens is that we really don't know for sure until we get all the way through to the end of the case.

MS. BROOKS-McCOLLUM: Just to have that. That's all the attorney asks for, something from the Court to basically say that -- basically feel that you basically are entitled to

indemnification, to basically take the case where it's only on a certain contingency, which then I have no problem giving the lawyer the contingency to take over these claims. That's why I asked Your Honor to basically decide on indemnification first. You did

say after that the attorney could come in and do an amended complaint to outline each and every issue

THE COURT: All right. Okay. so, I think now I understand better.

I thought the focus was more on the advancement. I understand w at you're saying. That makes sense. So, it's important that we move ahead to the indemnification issue itself and make sure we rule on that.

So, I think what all this boils down to is that, for the cease and desist order that has been requested at this point in the papers that you submitted on the record that's presently before me, I'm denying the cease and desist order. And of course, at some point later in the proceeding you have more concrete evidence, and it looks like that kind of an order is important, then you can bring that.

MS. BROOKS--McCOLLUM: Evidence like my family being threatened again, but without showing who did it?

THE COURT: No. Evidence that links it to one of these parties who's before me. MS. BROOKS-McCOLLUM: I can get threatened every week, but because we don't catch the person we'll have to move.

THE COURT: I am encouraging

Mr. Kafader and his clients to at least do everything that they can not to add to the problem by stirring things up. The difficulty is that undoubtedly you're making a lot of allegations here. You feel very strongly about it. But the more you're accusing people of doing things that would be illegal, that they think are crazy allegations against them, their back is going to get up. It just makes for a very tense situation for everybody involved. That doesn't justify anybody acting outside the law.

And I don't -- I'm saying right here, I don't have any evidence that these individuals did. But in that kind of a context, then it spills over to other people and who knows who hears. what and takes some kind of crazy action.

MS. BROOKS-McCOLLUM: I have one more question on the sections that apply in Chancery Court because you basically said you can issue a cease and desist order. The crimes under there call for felony charges. They basically have different levels of felony charges. That is what I want. I want the

THE COURT: Okay.

But, see, this Court doesn't do any criminal – you can't bring a criminal case into this Court. What you need there is for the attorney --- the police and then the Attorney General's Office to believe that there's sufficient – that there is a crime here, and they either – they institute the criminal proceedings, which are in the Superior Court. The only kind of thing I'm talking about is if there's some sort of a – you need an injunction to tell somebody to stop, you know, putting graffiti on your wall or something like that.

MS. BROOKS-MCCOLLUM: From the Internet violations. The Internet violations, since it falls under Chancery Court, and that they – each one assesses different felony charges if they're convicted of having done those. If you're saying that once Chancery Court rules on if these persons did this, then I go back to the Attorney General's Office on those specific items and say these persons did post this stuff on the website?

THE COURT: What section of the code?

MR. KAFADER: Your Honor, she's

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CATHY D. BROOKS-McCOLLUM – No. 396, 2004

Plaintiff Below-
Appellant,
Superior Court

Court Below –

Of the State Of

Delaware,
7. in and for New Castle County

C.A. No. 04C-03-074

EMERALD RIDGE SERVICE CORPORATION, et.al.,

Defendants Below-
Appellees.

Submitted: April 1, 2005
Decided: May 26, 2005

Before STEELE, Chief Justice, JACOBS and IDGELY, Justices

ORDER

This 26th day of May 2005, upon consideration of the briefs on appeal and the record below, it appears to he Court that:

C. The plaintiff-appellant, Cathy D. Brooks-McCollum, filed an appeal from the Superior Court's June 16, 2004 and August 19, 2004 orders dismissing her claims.1 We find no merit to the appeal. Accordingly, we AFFIRM.

D. In March 2004, McCollum filed a complaint in the Superior Court alleging that defendants-appellees, Emerald Ridge Service

1 While the Superior Court's August 19, 2004 order was reduced to a writing, the June 16, 2004 order was issued orally from the bench following a hearing. He record does not

Corporation, a neighborhood service corporation, and its individual board members (collectively, "Emerald Ridge),2 violated certain provisions of the Federal Trade Commission Act3 and the Delaware General Corporation Law.4 On April 19, 2004, Emerald Ridge filed a motion to dismiss the complaint on the ground that the superior court lacked jurisdiction over McCollum's claims. On June 16, 2004, a hearing on the motion was held in the Superior Court and the judge issued an oral ruling from the bench.

E. While the record contains no transcript of the hearing or the Superior Court's oral ruling, Emerald Ridge represents, and McCollum does not dispute, that he Superior Court dismissed McCollum's claims for lack of jurisdiction, with the exception of what the Superior Court deemed to be a potential defamation claim. It also appears that the Superior Court afforded McCollum additional time to amend her complaint to set forth the defamation claim with particularity.

F. On June 28, 2004, McCollum filed a lawsuit in the United States District Court for the District of Delaware alleging some of he same claims asserted in her Superior Court and Court of Chancery complaints. On July 29, 2004, the Court of Chancery issued its decision denying

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contain a transcript of that ruling, nor does it reflect that McCollum ever ordered a transcript.

2 It appears that, at all times relevant, McCollum herself was a member of the board.

3 15 U.S.C. §§45-58

McCollum's indemnification claim. On the same date, McCollum wrote a letter to the Superior Court judge stating that she would not be filing an amended complain in the Superior Court and would instead be filing a motion to remove her case to the United States District Court.

G. McCollum filed a motion for removal in the United States District Court on August 11, 2004. On the same date, she filed a motion to dismiss in the Superior Court. In the motion, McCollum stated that she would no be amending her complaint to state her defamation claim with particularity and requested that the claim be dismissed. In accordance with McCollum's request, the Superior Court dismissed he claim with prejudice on August 19, 2004.

H. In this appeal, McCollum claims that the Superior Court committed error and abused its discretion when it dismissed her claims for lack of jurisdiction under the Federal Trade Commission Act and the Delaware General Corporation Law. She also claims hat the Superior Court's dismissal of her defamation claim was premature because it is not clear that her claims will be heard in the federal court.5

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4 Del. Code Ann. Tit. 8, § 219(a) and (b). McCollum also filed a related lawsuit in the Court of Chancery requesting indemnification for costs she had incurred in filing her legal actions.

5 It appears that the District Court dismissed McCollum's claims and the matter is now on appeal to the United States Court of Appeals for the Third Circuit. In her reply brief, McCollum appears to argue that, should the Court of appeals affirm the ruling of the District Court, she should be allowed to return to the Superior Court to prosecute her claims.

I. The Rules of this Court direct all parties to order a transcript and to include in their appendix those portions of the record that are relevant to any claims on appeal. In this case, McCollum, as the appellant, had the burden of producing "such portions of the…transcript as are necessary to give this Court a fair and accurate account of the context in which the claim of error occurred" and "a transcript of all evidence relevant to the challenged finding or conclusion."6 The failure of McCollum to include in the record a transcript of the Superior Court's oral ruling dismissing her federal and corporate claims for lack of jurisdiction precludes appellate review of her argument that the Superior Court erred by dismissing those claims.7

J. McCollum's second argument fares no better. McCollum herself sought dismissal of her potential defamation claim in the Superior Court. She cannot now complain that the Superior Court took the action she requested merely because the federal court may refuse to hear her claims.

NOW, THEREFORE, IT IS ORDERED that the judgment of Superior Court is AFFIRMED.

BY THE COURT:

_____

Justice

6 Tricoche v. State, 525 A.2d 151, 154 (Del. 1987); Supr. Ct. R. 9(e) (ii) and 14(e).
7 It does not appear that McCollum's arguments have substantive merit in any case.

BY-LAWS OF EMERALD RIDGE SERVICE CORP.

1. MEETING OF MEMBERS:

Special meetings of the members may be called at any time by the President and shall be called by the President or Secretary on the request in writing or by vote of a majority of the Directors at the request in writing of a majority of members in the Corporation.

4. DIRECTORS:

The property and business of the Corporation shall be managed and controlled by its Board of Directors, which shall consist of two (2) members so long as they are appointed, and which **thereafter** shall consist of **three** or more **elected** Directors, not to exceed five (5). Directors must be members of the Corporation or officers, partners or employees of members of the Corporation.

At the first annual meeting, at least one Director shall be elected for a three-year term, one shall be elected for a two-year term and one shall be elected for a one-year term. Thereafter, at least one Director shall be elected at each annual meeting for a two year term, with the objective that at least two members on any three or four Director Board, and at least three members on any five Director Board, shall hold over at each election so that the Board shall never consist entirely of inexperienced directors after the first election (unless by resignation or recall). **The Directors shall hold office until the next annual election or until their successors are elected and qualify.** They shall be **elected** by the members, except that if there be a vacancy in the Board by reason of death, resignation or otherwise, such vacancy shall be filled for the unexpired term by a majority vote of the remaining Directors, though less than a quorum.

8. OFFICERS OF THE CORPORATION:

The officers of the Corporation shall be a president, or more Vice-Presidents, Secretary, Treasure, and such other officers as may from time to time be chosen by the Board of Directors **The President and Vice-Presidents shall be chosen from among the Directors.**

The **officers** of the Corporation **shall hold office until successors are chosen and qualify in their stead**. Any officer **chosen** or **appointed** by the Board of Directors may be removed either with or without cause at any time by the affirmative vote of the majority of the whole Board of Directors. If the office of any officer or officers becomes vacant for any reason, the vacancy shall be filled by the affirmative vote of a majority of the whole Board of Directors.

25. INDEMNIFICATION:

Section I. Right to Indemnification

Each person who was or is made a party or is threatened to be made a party to or is involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative ("proceeding"), by reason of

the fact that he or she or a person for whom he or she is the legal representative is or was a Director or officer, employee or agent of the Corporation or is or serving at the request of the Corporation as a Director or officer, employee or agent or another corporation, or of a partnership, joint venture, trust or other enterprise, including service respect to employee benefit plans, whether the basis of such proceeding is alleged action in an official capacity as a Director, officer, employee or agent or in any other capacity while serving as a Director, officer, employee or agent, shall be indemnified and held harmless by the Corporation to the fullest extent authorized by the Delaware General Corporation Law, as the same exists or hereafter be amended (but, in the case of any such amendment, only to the extent such amendment permits the Corporation to provide broader indemnification rights than said law permitted the Corporation to provide prior to such amendment) against expenses, liability and loss including attorneys fees, judgments, fines,..... Such right shall be a contract right shall include the right to be paid by the Corporation expenses incurred in defending any such proceeding in advance of its final disposition; provided, however that the payment of such expenses incurred by a Director or officer of the Corporation in his or Petitioners capacity as a Director or officer (and not in any other capacity in which services was or is rendered by such persons while a Director or officer, including, without limitation, service to an employee benefit plan) in advance of the final disposition of such proceeding, shall be made only upon delivery to the Corporation of an undertaking, by or on behalf of such Director or officer, to repay all amounts so advanced if it should be determined ultimately that such Director or officer is not entitled to be indemnified under this section or otherwise.

CERTIFICATE OF INCORPORATION OF EMERALD RIDGE SERVICE CORPORATION

FOURTH: The said Corporation is not a corporation organized for profit, and it shall have no capital stock. The members of the Corporation shall be the owners of the lands and premises in the Community, but only for so long as they are and remain such owners as set forth hereinafter..... Subject to the provisions of paragraph FIFTH hereof, at all the meetings of the Corporation the owners of each lot shall be entitled collectively to cast such vote or votes as provided for in the By-Laws, which vote or votes may be cast in person or by proxy.

SIXTH: At the first annual meeting of members of which such members are entitled to elect the Board of Directors, and at each regular annual meeting thereafter, the members of the Corporation shall establish the amount of annual assessment for the coming year, and the Board of Directors shall thereon promptly levy such assessment.

TENTH: A Director of the Corporation shall not be personally liable to the Corporation or its members for monetary damages for breach of fiduciary duty as a Director except for liability (i) for any breach of the Director's duty of loyalty to the Corporation or its members, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the Delaware General Corporation Law, or (iv) for any transaction from which the Director derived an improper personal benefit.

To: cathy.brooks.mccollum@effem.com, ...
From: Visvarr@cs.com
07/27/2003 04:57p.m.

2 What process or guideline gave one board member the right to contact the lawyer, at the expense of the community, on this question without first approaching the other board members? Is this policy? If so, it shows lack of financial responsibility.

5. I suggest that the entire board step down, reinstating the previous board until a fair solution can be attained, that satisfies the guidelines and is fair to all involved, and *"I start this process by removing myself from a board that does not legally exist."*

Ruth

CONDOMINUM ASSOCIATION POLICY

STATE FARM INSURANCE

STATE FARM FIRE AND CASUALITY COMPANY
STATE FARM GENERAL INSURANCE COMPANY
HOME OFFICE: BLOOMINGTON, ILLINOIS

DECLARATONS PAGE
STATE FARM FIRE AND CASUALTY COMPANY
ONE STATE FARM DRIVE
FREDERICK, MD 21709-1000
A STOCK COMPANY WITH HOME OFFICES IN
BLOOMINGTON, ILLINOIS

EMERALD RIDGE SERVICE CORP.
P.O. BOX 281
BEAR, DE 19701-0281

SECTION II COMPREHENSIVE BUSINESS LIABILITY
[Exhibit I Supplied With Petitioners Brief, page 18-19,22,24]

We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury, property damage, personal injury or advertising injury.....

2. to advertising injury caused by an occurrence committed in coverage territory during the policy period. The occurrence must be committed in the course of advertising your goods, products or services.

SUPPLEMENTARY PAYMENTS

In addition to the Limit of insurance, we will pay, with respect to any claims or suit we defend:

4. all reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or suit, including actual loss of earnings, up to $100 a day because of time off from work.
5. all costs taxed against the insured in the suit;

BUSINESS LIABILITY EXCLUSIONS

Under Coverage L, this insurance does not apply:

16. to personal injury or advertising injury:
    a. rising out of oral or written publication of material if done by or at the direction of the insured with knowledge of its falsity:
    b. arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;

c. arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured; or…..

SECTION II OPTIONAL COVERAGE

Optional Coverage

The following Optional Coverage is subject to all terms and conditions applicable to Section II of this policy, except as otherwise provided for herein.

This Optional Coverage applies only as indicated in the Declarations.

OPTION DO – Directors and Officers Liability

1. We will pay those sums that the insured becomes legally obligated to pay as damages, because of "wrongful acts" committed by an insured solely in the conduct of their management responsibilities for the Condominium/Association.
2. This optional covers does not apply to:
   a. any dishonest, fraudulent, criminal or malicious act, including fines and penalties resulting from these acts;
   g. violation of any federal or state civil rights law or local ordinance, including but not limited to discrimination on account of race, religion, sex or age; or….
3. When used in the provisions of this Option DO, the unqualified word insured means only the following:
   a. any of your directors or officers, collectively and individually, which form your administrative body provided that each individual:
      (1) is **duly elected** by the unit-owners to serve on the managing body of the Condominium/Association; and
      (2) acts within the scope of their duties on your behalf;
   b. any of your members, but only with respect to ther liability for your activities or activities they perform on your behalf as a member of a committee appointed by the administrative or managing body of the Condominium/Association;
4. When used in the provisions of this Option DO:
   a. "wrongful acts" means any negligent acts, errors, omissions or breach of duty directly related to the operations of the Condominium/Association;
   b. "occurrence" means a "wrongful act", including any conduct related to any of these, during the policy period, which results in a claim made in writing or suit filed no later than one year from the end of the policy period.

SECTION II DESIGNATION OF INSURED

WHO IS AN INSURED

1. If you are designated in the Declarations as:

c. an organization other than a partnership or joint venture, you are an insured. Your executive officers, directors and trustees are insureds but only with respect to their duties as your officers, directors or trustees. Your stockholders are also insureds but only with respect to heir liability as stockholders.

From: Don Gouge (mailto:dongouge@magpage.com)
Sent: Wednesday, March 31, 2004 5:26 PM
To: .....
Subject: RE: ERSC

...., I had a fairly long discussion today with Ed Kafader, the State Farm attorney.

I am leaving soon for a short vacation, returning to the office next Wednesday.

I think that it is important for me to meet with the Board, such as it is, ASAP. You can certainly pass this email onto the Board members.

The short answer is that "new elections for an entirely new Board must be held. In any event I will be available to discuss upon my return.

c. .....

From: "Don Gouge",dongouge@magpage.com>
To: mccollumc1@Comcast.net; Shareef727@aol.com; jmello1@ix.netcom.com; Rbrevett@comcast.net.
Sent: Monday, February 02, 2004 2:51 PM
Subject: Boards Decision

I do believe that the issues can and should be resolved. The easy method is for new elections for the entire Board and then revise the by-laws to address the concerns that have been raised.

BOARD MEETING MINUTES – 8/13/2003 – WEDNESDAY

- Discussed next Board Meeting will be on Thursday, September 4, 2003 at the Bear Library.
- Discussed Architectural Guidelines and took a vote to have the Corporation decide if they would like to change how the Architectural committee is run. The vote was that we will have the Corporation rule on new terms for the ARC
- We also took a vote on incorporating the Open Space sections into the overall community guidelines, thus adding tables, chairs and grills cannot be placed in front of ones home.
- Voted on the positions each Board member will hold. Ken Shareef will hold the position of President, Maudy Melville will hold the position of First Vice President, Renford Brevett will hold position of Second Vice President, and Cathy D. Brooks-McCollum will hold the position of Secretary and Treasurer.
- The next Board meeting will be held at Renford's home on Wednesday, October 15, 2003.

Discussed each person putting together a BIO for next board meeting and sending to all members via e-mail.

Emerald Ridge Service Corporation
December 29, 2003

Minutes for ERSC emergency Board Meeting
Attendees:
Ken Shareef – President
Maudy Melville 1st Vice President
Renford Brevett 2nd Vice-President

Meeting was called to order at 7:40p.m.
The issue of the letter dated 12/26/03 and distributed to the community by Treasurer & Secretary Cathy D. Brooks-McCollum was brought to the floor for discussion. In said letter, actions by Cathy Brooks-McCollum over the past several weeks have misrepresented the board, financially obligated the board and the community without consent of other board members, and Cathy Brooks-McCollum has acted outside of current board responsibilities without knowledge and/or consent of current board members. Motion was made and seconded to remove Cathy D. Brooks-McCollum fro Petitioners current positions of Secretary & Treasurer.

.....

State Farm Insurance Companies

March 11, 2004

MS. CATHY BROOKS-MCCOLLUM
115 EMERALD RIDGE DRIVE
BEAR, DE 19701

RE: Claim Number: 08-R337-251
Insured: Emerald Ridge Service Corporation

Dear Ms. Brooks-McCollum

This will acknowledge your letter to our Corporate headquarters dated March 1, 2004.

It is my understanding you are a Petitioners in a lawsuit against our named insured, Emerald Ridge. We are providing a defense to the board members under the Director and Officer's coverage of the corporation's policy. We have tendered this defense in response to your lawsuit filed in Chancery Court. Attorney Ed Kafader has been in contact with you regarding this lawsuit.

We have no contractual obligation to provide you with counsel since you are the Petitioners in this action. State Farm is honoring its contractual obligations under the contract and we have instructed Mr. Kafader to proceed with appropriate discovery. We will also defend any lawsuit filed against this Company as we believe there is no viable cause of action.

Should you have any questions, please contact Attorney Ed Kafader or Team Manager Ed Dillon at (302) 995-0399

Sincerely,

/s/Larry L. Wilson
State Farm Fire and Casualty Company

To: dongouge@magpage.com
From: Valerie.Longhurst",Valerie.Longhurst@Comcast.net
08/04/2003 11/14 A.M.
cc: "Cathy McCollum" cathy.brooks.mccollum@effem.com
Subject: RE: ERSC
Don,
No problem with the delay. Since I have voluntarily removed my name off the board and decided not to run for re-elections the new contact you should send the letter to is Cathy McCollum.

Ferry, Joseph & Pearce, P.A.
Attorneys At Law
824 Market Street, Suite 904
P.O. Box 1351
Wilmington, Delaware 19899
(302) 575-1555

March 5, 2004

Ms. Cathy Brooks-McCollum
115 Emerald Ridge Drive
Bear, DE 19701

RE: Brooks-McCollum v. Emerald Ridge Corporation et al

Dear Ms. Brooks-McCollum:

This letter is a follow up to our phone conversation of March 3, 2004. In that phone conversation, you and I discussed the deletions that you have requested from postings on the Corporation's website. I indicated to you that the Board was willing to delete a reference from the minutes of the January 15, 2004 general meeting in which it was indicated that the Power Wash was improperly bid. In particular, I informed you that the Board was willing to delete the words "that was improperly bided". I informed you that the Board was not willing to make other changes to the website. You informed me that you were not included to accept the offer to settle this matter for $1,150.

Sincerely,

/s/Edward F. Kafader
EFK/lma

cc: Glenna Molster State Farm Ins.

EMERALD RIDGE MAINTENANCE DECLARATIONS

(b).....All such assessments must be fixed at a uniform rate for all lots.....The assessments levied by the maintenance Corporation shall be used exclusively for the purpose of maintaining said Roads and Private Space.

(c).....An annual assessment, if necessary, shall be set by a majority vote of the members who are voting in person or by proxy at the annual meeting, and any special assessments shall be set by a majority vote of the members who are voting in person.....

(j).....the assessment shall bear interest from the date of delinquency at the highest rate of interest then legally permissible to charge individuals for mortgage loans not to exceed twenty percent(20%)

Emerald Ridge Service Corporation
P.O. Box 281
Bear, DE 19701

To: Homeowners
From: Board of Directors
RE: Annual Meeting

Attached to this letter you will find an Agenda and Proxy associated with our Annual Meeting to be held at Red Lion Christian Academy in the Multi-Purpose Room from 7:00p.m. to 9:00p.m. on June 30, 2004.

We look forward to seeing you that evening if you can make it, and we hope to provide answers to any and all questions you might have. **Mr. Ed Kafader** of Ferry, Joseph **(State Farm's Attorney)** will discuss matters as it relates to the lawsuit as it continues to go forward in court. Please note that the annual assessment for the forthcoming 2005 budget cycle has been sent under separate cover, and **the board has reduced the assessment to $75** for the coming financial period.

We will accepting nominations from the floor at this election. If you would like us to add your name to the list of candidates beforehand, please contact Mark Martell at 834-5595 and we'll update the list accordingly.....

EMERALD RIDGE SERVICES CORPORATION ANNUAL MEETING, JUNE 30, 2004 FROM 7:00-9:00 P.M. Red Lion Christian Academy – Multi-Purpose Room

BALLOT

2004 Election of Officers:

The **entire** Board of Directors has resigned effective **June 30, 2004 at 7:00 p.m.** Therefore, an entire new Board of Directors must be elected. The current Board is standing for election. **No other candidates** have submitted their name for election.

The individuals with the top two vote's totals will serve two-year terms, until June 2006. The individuals with the third and fourth highest vote totals will serve one-year terms and will stand for re-election in June 2005.

The candidates are listed below. Please place a mark on the ballot for your choices:

1. Renford Brevett
2. Mark Martell
3. Maudy Melville
4. Ruth Visvardis

.....

EMERALD RIDGE SERVICE CORPORATION
PLO. BOX 281
BEAR, DE 19701
NOTICE OF RESCHEDULED ANNUAL MEETING AND PROXY

TO: Homeowners
FROM: Board of Directors

The annual meeting for the Emerald Ridge Service Corporation has been rescheduled for Wednesday, August 11th, 2004 at 7:00p.m. in the Multi-purpose room at Red Lion Christian Academy, located on Route 71

.....

First let me thank those of you who attended the meeting scheduled for June 30th, and our apologies that it could not proceed, but corporate guidelines mandate that a quorum must be represented and we came up short. This will not be a problem with this meeting as enough proxies have been received to proceed with business. Please plan to attend.

Ed Kafader of Ferry & Joseph (State Farm Attorney) will be present to discuss current status and developments in the lawsuits.....

If you are unable to attend the meeting, and have not previously submitted a proxy, or wish to update your proxy previous to the meeting, you will find a copy attached. Names have been added to the proxy.....

EMERALD RIDGE SERVICE CORPORATION
Wednesday 8/11/2004
7:00PM – 9:00PM
Red Lion Christian Academy
Multi-Purpose Room
(Upper School Building adjacent to route 71)
Community Meeting
Agenda
.....
3. Re-certification of Prior Board Activities.....

EMERALD RIDGE SERVICES CORPORATION ANNUAL MEETING, AUGUST 11, 2004 FROM 7:00-9:00 P.M. Red Lion Christian Academy – Multi-Purpose Room

BALLOT

2004 Election of Officers:

We are electing a new board of directors during the upcoming meeting. The current board is standing for **re-election** and others have volunteered to run.....

The individuals with the top two vote's totals will serve two-year terms, until June 2006. The individuals with the third and fourth highest vote totals will serve one-year terms and will stand for re-election in June 2005.

The candidates are listed below. Please place a mark on the ballot for your choices:

1. Renford Brevett
2. Mark Martell
3. Maudy Melville
4. Ruth Visvardis
5. Sue Nixon
6. Robert Bukowski
7. Write in
8. Write in
9. Write in

.....

January 23, 2004

Kenneth N. Shareef
Emerald Ridge
1 Winchester Court
Bear, DE 19701

Dear Mr. Shareef:
RE: Emerald Ridge Service Corp-Account#3049-8073
While we have reviewed documentation submitted by both Ms. Brooks-McCollum and Mr. Shareef, we are not in a position to determine who is authorized to act on the Emerald Ridge Service Corporation's account with Wachovia Securities, nor do we wish to act as a judge or arbitrator in this matter. We understand that Ms. Brooks-McCollum has filed a civil action in chancery court of New Castle County to have the court determine how the affairs of the corporation should be handled. We will continue to hold the assets in the account until resolution by the court providing us guidance on who is authorized to act on our account. If this lawsuit is dismissed without such resolution and the disputing parties can settle their differences, we will need a written opinion of independent counsel for the company advising us what individuals are properly authorized to act prior to accepting any further instructions on the account. We hope that the interested parties can resolve the issue, either with or without court intervention. In the meantime, we ask that you not continue to call us or send us further documentation in support of your differing views as we are not willing to substitute our judgment for that of the court.
Sincerely,

/s/Gary L Gittings, CFP
Branch Manager
Managing Director
Private Client Group
cc: Cathy D. Brooks-McCollum

FERRY, JOSEPH & PEARCE, P A.
ATTORNEYS AT LAW
824 MARKET
SUITE 904
o BOX 1351
WILMINGTON. DELAWARE 19E190
(302) 575-1555
(ALSO PA BAR)
(ALSO NJ BAR)
(ALSO FL, MA AND NY BAR #+14J BARN BAR ONLY

November 17, 2005

Ms, Cathy Brooks-McCollum PO Box l2166

Wilmington, DE 19850

RE: Brooks-McCollum v. Emerald Ridge Service Corporation Brooks-McCollum v. State Farm

Dear Ms, Brooks-McCollum:

This Letter will serve as a follow up to our phone conversation regarding settlement of the above captioned matters. You have agreed that you will dismiss with prejudice all cases that you have filed against State Farm Fire and Casualty Company and its related companies as well as all cases involving suits against current and former members of the Emerald Ridge Service Corporation et al. In return for your dismissal of these cases as well as an execution of an appropriate release of all parties to those suits, State Farm will make payment to you in the amount of $21,038,77. In addition to the execution of a release against all parties, an appropriate stipulation dismissing these cases, as well as the payment by State Farm, the parties have not agreed to any further terms of settlement. In particular, there has been no agreement regarding the confidentiality of settlement, nor will the parties enter into any agreement not disparage each there in the future.

I will be sending you stipulations and a release in the near future. Once the signed documents are received back from me, I will forward a check payable toy you in the amount o of $21,038.77. I will send you back a clocked in copies of the stipulations once they are filed.

We have discussed a lawsuit which you recently attempted to the in Superior Court against current and former members of the Board of Emerald Ridge Service Corporation as well as me and Donald Gouge, You have informed me that you do not believe this case has been officially filed in Superior Court, I have checked the records of the prothonotary and can not find any record of the filing of that case. However, we have agreed that in the event this case has been filed, you will sign an appropriate stipulation of dismissal.

In the event That there are outstanding filing fees or court costs which are still owing R any of the courts in these cases, you alone will be responsible for the payment of-(those costs. Neither State Farm nor its insured will be responsible for paying any costs, other than the check in the amount of which I will for and to you upon receipt of executed stipulations of dismissal and release.

Please call me if you have any questions.

Sincerely

/s/Edward F. Kafader

EFK/Ima

cc: Mr. Edward Dillon

(Claim) # 08-R337-251

Stephen P. Casarino

Esquire Jonathan Parshal

Esquire Harry Feinberg, Esquire

CASARINO, CHRISTMAN AND SHALK, P.A.
ATTORNEYS AT LAW
800 NORTH KING STREET
P.O. BOX 1276
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December 8. 2005

The Honorable Joseph J. Farnan, Jr,
United 5tales District Court
844 N. King Street
Lock Box 27
Wilmington, DE 19801

Re: Brooks-McCollum v-. State Farm Civil Action No. 04-419 JJF

Dear Judge Farman:

The Petitioner has recently filed a motion to compel a settlement. It is my understanding that the Petitioner and Ed Kafader who represents Respondents in other cases entered into a global settlement of all cases filed by Ms. Brooks-McCollum. I was notified by Mr. Kafader of the settlement although I had no involvement in the discussion concerning the settlement nor the terms of the settlement,

Apparently there appears to be a misunderstanding and Mrs. Brooks-McCollum has indicated that there is no settlement and further that she wants the court to enforce the settlement,

I would ask that the court to hold a conference with Ms. Brooks-McCollum, Mr. Kafader and me in order to determine the status of the settlement. There may simply be a misunderstanding concerning the terms of the release which may be resolved at a court conference. On the other hand, if there is n fundamental dispute and there is no settlement the court could give us some guidance on how to proceed in this matter.

Respectfully yours.

/s/ Stephen P. Casarino

cc: Edward F. Kafader, Esquire
Cathy Brooks-McCollum

No. 06-17

Supreme Court, U.S.
FILED
JUL 28 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CATHY D. BROOKS-McCOLLUM,

Petitioner,

v.

EMERALD RIDGE SERVICE CORPORATION BOARD OF DIRECTORS, KENNETH SHAREEF, RENFORD BREVETT, MAUNDY MELVILLE, VALERIE LONGHURST, MARK MARTELL, RUTH VISVARDIS FERRY, JOSEPH & PEARCE, P.A. and EDWARD F. KAFADER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the petitioner's complaint state a basis for the exercise subject matter jurisdiction over the matters alleged in the petitioner's complaint?

LIST OF ALL PARTIES

The caption contains all parties involved in the Circuit Court.

CORPORATE DISCLOSURE STATEMENT

Emerald Ridge Service Corporation is a corporation in the State of Delaware. It has no parent corporations. No publicly held company owns 10% or more of its stock.

Ferry, Joseph and Pearce, P.A. is a professional association in the State of Delaware. It has no parent corporations. No publicly held company owns any stock in the professional association.

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CITATIONS OF OPINIONS AND ORDERS ENTERED IN THE INSTANT MATTER

Brooks-McCollum v. Emerald Ridge Service Corporation, C.A., No. 04-073 JJF (D.Del. Jan. 11, 2005).

Brooks-McCollum v. Emerald Ridge Service Corporation Board of Directors, 166 Fed.Appx. 618, 2006 WL 314460 (3rd Cir. 2006).

STATEMENT OF BASIS FOR JURISDICTION OF THIS COURT

Petitioner seeks Writ of Certiorari from a judgment of the Third Circuit Court of Appeals rendered on February 10, 2006.

CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment of the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment, Section 1 of the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1332(a) provides:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

1. citizens of different States;

2. citizens of a State and citizens or subjects of a foreign state;

3. citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

4. a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

STATEMENT OF CASE

This case arises out of the petitioner's involvement on the board of directors of a private neighborhood association. The petitioner was elected as a member of the Board of Directors of the Emerald Ridge Service Corporation in June of 2003. Subsequently, she was appointed Secretary and Treasurer of the Corporation by her fellow board members. By-law 8 of the Corporation provides that the board of the directors shall choose the officers of the Corporation. It also provides that any officer chosen or appointed by the Board may be removed either with or without cause by affirmative vote of the majority of the Board of Directors.

At a meeting of the Board of Directors held on December 29, 2003 the Board of Directors voted to remove Ms. Brooks-McCollum as an officer of the Corporation. Ms.

Brooks-McCollum resigned her position as a director of the Emerald Ridge Service Corporation on January 15, 2004.

On January 14, 2004 Ms. Brooks-McCollum filed an amended complaint in the Chancery Court of the State of Delaware captioned *Cathy D. Brooks-McCollum v. Emerald Ridge Service Corporation, Ken Shareef, Renford Brevett, Maundy Melville, Valerie Longhurst.* C.A., No. 147-N (the "Chancery Court case"). That Complaint alleged that the Board of Directors of the Emerald Ridge Corporation had violated various provisions of the by-laws and charter of the Corporation as well as various provisions of the Delaware Corporation Law. That action remains pending in Delaware Chancery Court.

On March 5, 2004 plaintiff filed a complaint in Superior Court of the State of Delaware in a case captioned *Brooks-McCollum v. Emerald Ridge Service Corporation,* Del Super., C.A., No. 04C-03-074-MMJ ("the Superior Court case"). The Complaint alleged various violations of the Federal Trade Commission Act, alleged the violations of 8 *Del.C.* §219 and also alleged that the defendants had failed to secure the agreement of the majority of the members of the Corporation to seek coverage under a directors' and officers' policy issued to the Corporation. That case has been dismissed.

On June 29, 2004 Ms. Brooks-McCollum filed her suit in the instant matter in United States District Court for the District of Delaware against the same defendants named in the Superior Court and Chancery Court cases. Her complaint added Edward F. Kafader and Ferry, Joseph & Pearce, P.A. as parties. Mr. Kafader represented the defendants in the Chancery Court and Superior Court matters. He is employed by Ferry, Joseph and Pearce, P.A.,

a private law firm. By Order dated January 11, 2005, District Court dismissed Ms. Brooks-McCollum's complaint, finding lack of subject matter jurisdiction. The District Court also denied all motions made by Ms. Brooks-McCollum in an Order issued on the same date.

Ms. Brooks-McCollum then timely filed an appeal from the District Court's Opinion and Order with the Third Circuit Court of Appeals. On February 10, 2006 the Third Circuit Court of Appeals issued an opinion affirming the District Court's dismissal of petitioner's claims for lack of subject matter jurisdiction and affirmed the District Court's denial of the motions the petitioner had filed.

ARGUMENT

THE PETITIONER'S COMPLAINT SETS OUT NO BASIS FOR THE EXERCISE OF FEDERAL JURISDICTION

A. There Is No Diversity of Citizenship Between The Parties.

28 U.S.C. §1332 confers jurisdiction over federal courts where the matter in controversy is between citizens of different states and the amount in controversy exceeds $75,000.00. The caption of the petitioner's complaint filed in District Court on June 29, 2004 lists petitioner's address as Bear, Delaware. The same caption lists the addresses for Ferry, Joseph and Pearce, P.A. and Edward F. Kafader as Wilmington, Delaware. An affidavit of Michael B. Joseph was filed with the District Court at the same time the motion of Edward F. Kafader and Ferry, Joseph and Pearce, P.A. was filed. Mr. Joseph's affidavit indicates that Ferry, Joseph and Pearce, P.A. is

a professional service corporation incorporated in the state of Delaware and operates its only office at 824 Market Street in Wilmington, Delaware. Mr. Kafader and Ferry, Joseph & Pearce, P.A. are both citizens of the state of Delaware. Ms. Brooks-McCollum also is a citizen of the state of Delaware. Therefore, there is no diversity of jurisdiction between the plaintiff and Mr. Kafader and Ferry, Joseph and Pearce, P.A. Section 1332 of Title 28 of the United States Code confers jurisdiction upon federal courts only if there is complete diversity of jurisdiction between the parties.

Although petitioner referred to 28 U.S.C. §1332 in her complaint as a basis of jurisdiction, it appears that the petitioner now recognizes there is no possibility for a federal court to exercise jurisdiction under the diversity statute in this matter. To the extent petitioner asserts diversity jurisdiction, she is requesting that this Court review a misapplication of a properly stated federal rule or law.

B. The Petitioner's Complaint Does Not Allege a Proper Basis for Federal Question Jurisdiction.

Since the District Court lacked diversity subject matter jurisdiction over the matters alleged in the complaint, it could only exercise subject matter jurisdiction over the case if the complaint sufficiently alleged a federal question upon which subject matter jurisdiction could be based. Federal question jurisdiction is set out in 28 U.S.C. §1331.

At page 2 of her complaint, the petitioner alleged that Mr. Kafader and Ferry, Joseph and Pearce violated various

sections of the Delaware Rules of Professional Conduct. At pages 33 and 34 of her complaint, petitioner appears to distill her claims against all of the defendants. It appears the only claim asserted against Mr. Kafader and Ferry, Joseph and Pearce, P.A. in this section of the complaint is a restatement of the violation of the Delaware Rules of Professional Conduct.

At page 1 of her complaint, Ms. Brooks-McCollum alleges that the defendants have violated rights guaranteed her by the First, Fifth and Fourteenth Amendments of the United States Constitution.

The respondents' challenge to jurisdiction in this matter was based upon the allegations contained in the complaint. As such the respondent's challenge is a facial attack. *Carpet Group International v. Oriental Rug Importers Association*, 227 F.3d 62 (3d Cir. 2000). When considering a facial attack on subject matter jurisdiction, the Court looks to the plaintiff's allegations contained in the complaint, considering those allegations in a light most favorable to the plaintiff. *Mortenson v. First Federal Savings and Loan Association*, 549 F.2d 884, 891 (3d Cir. 1977). Ms. Brooks-McCollum's complaint does not allege that Mr. Kafader or Ferry, Joseph and Pearce are agents of the United States government, any state government or any subdivision thereof. In fact, neither Mr. Kafader nor Ferry, Joseph and Pearce, P.A. have acted as an agent of any governmental entity in this matter. In *Lugar v. Edmonson Oil Company*, 457 U.S. 922, 937 (1982) this Court stated the following:

> [T]he party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained

> significant aid from state officials, or because his conduct is otherwise chargeable to the State.

In her Complaint, Ms. Brooks-McCollum makes no allegation indicating Mr. Kafader or Ferry, Joseph and Pearce were acting as a state official or acted together with state officials in depriving her of any constitutional rights. Therefore, the Third Circuit's affirmance of the District Court's dismissal was appropriate in this matter. Once again, the petitioner in this matter is seeking review of a supposed misapplication of a properly stated rule of law.

CONCLUSION

For the reasons stated herein, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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